Supreme Court, U.S.
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In the Supreme Court of the United States

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Petitioner,

v.

TENNESSEE REGULATORY AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Tennessee has required a publisher of telephone directories to display the names and logos of competing telephone companies on the cover of the white pages directories that it publishes for its affiliated telephone company. The question presented is whether the constitutionality of state-compelled commercial speech that is not necessary to correct a misstatement should be judged by the First Amendment test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), or by the more lenient test set forth in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

PARTIES TO THE PROCEEDING

The petitioner is BellSouth Advertising & Publishing Corporation. The respondents are the Tennessee Regulatory Authority, AT&T Communications of the South Central States, Inc., MCI WorldCom Network Services, Inc. (formerly MCI Telecommunications, Inc.), and XO Communications, Inc. (formerly NEXTLINK Tennessee, Inc.).

RULE 29.6 STATEMENT

Petitioner BellSouth Advertising & Publishing Corporation is a wholly-owned subsidiary of BellSouth Enterprises, Incorporated. BellSouth Enterprises, Incorporated, is a wholly-owned subsidiary of BellSouth Corporation, which is publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

BellSouth Publishing & Advertising Corporation ("BAPCO") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Tennessee in this case.

OPINIONS BELOW

The decision of the Supreme Court of Tennessee (App., *infra*, 1a-30a) is reported at 79 S.W.3d 506. The decision of the Court of Appeals of Tennessee (App., *infra*, 31a-144a) is reported at 2001 WL 134603. The decisions of the Tennessee Regulatory Authority ("TRA") (App., *infra*, 145a-160a, 161a-169a) are reported at 1998 Tenn. PUC LEXIS 15 and 1998 Tenn. PUC LEXIS 17.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on July 2, 2002. A timely petition for rehearing was denied on August 21, 2002 (App., *infra*, 170a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law abridging the freedom of speech."

STATEMENT

In recent years, this Court has developed a substantial body of law regarding the protection afforded by the First Amendment to commercial speech. Applying an intermediate level of scrutiny under the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the Court has invalidated many governmental restrictions on truthful and nonmisleading commercial speech. In other decisions, the Court has affirmed that corpo-

rations, like individuals, have an important protected interest in *not* uttering or supporting messages with which they disagree. Accordingly, the Court has struck down regulations compelling corporations to support the advertising of their commercial competitors or to publish speech by third parties that opposes their interests.

Years before these speech-protective decisions, the Court also ruled, in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), that the government may impose on commercial entities disclosure requirements that are reasonably related to the goal of preventing the deception of consumers. This case concerns the proper scope of that decision. In *Zauderer*, the Court approved under the "reasonable relationship" test a requirement that an attorney include in an advertisement a factual statement that was necessary to prevent the advertisement itself from misleading consumers. Here, however, the Tennessee Supreme Court relied on *Zauderer* in approving a far more intrusive example of compelled speech: an administrative order requiring a publisher of telephone directories to print the names and logos of competitors on the cover of its products. The court approved this mandatory co-branding despite the agency's concession that the existing telephone directory covers were not misleading.

The scope of the government's power to impose content-specific requirements on commercial speech is an important and recurring issue that deserves the Court's attention. The Tennessee Supreme Court has deemed *Zauderer* to establish "the defining test for First Amendment analysis of compelled speech cases." App., *infra*, 24a. Other courts also have applied *Zauderer*'s "reasonable relationship" test to all forms of compelled commercial speech, whether or not the mandated speech is intended to prevent consumer deception. But other courts have been more solicitous of a commercial actor's right *not* to speak; these courts have held that *all* governmental efforts to regulate non-misleading speech – whether in the form of limitations on speech or requirements to speak –

must satisfy the *Central Hudson* test. Because the government action here could not have satisfied that test, this case presents the issue of whether *Zauderer* or *Central Hudson* sets the standard for evaluating the constitutionality of such compelled commercial speech.

Intertwined with this issue is another question of substantial importance: when, if ever, may the government compel a commercial speaker to carry the commercial messages of third parties with which it disagrees? The administrative orders approved by the Tennessee Supreme Court did not merely mandate publication of an uncontroversial factual message, but required the publisher to transform the cover of its own product into a billboard for other companies' names and trademarks. In analogous contexts, the Court has found such compelled support of an opposing message to be deeply offensive to the First Amendment. This case presents an ideal vehicle for the Court to clarify the reach of those principles.

1. BellSouth Telecommunications, Inc. ("BST"), a subsidiary of BellSouth Corporation ("BellSouth"), formerly provided local telephone services in Tennessee as a regulated monopoly. Today BST is one of many companies competing to provide local telephone service in Tennessee markets. R. Vol. 16 at 104.

Petitioner BAPCO, a separate subsidiary of BellSouth, is in the business of publishing both white pages and yellow pages telephone directories. Under a contractual arrangement with BST, BAPCO publishes and distributes white pages directories listing the telephone numbers of BST's Tennessee customers. R. Vol. 16 at 37-39. This arrangement satisfies BST's state-law obligation to provide its customers with "a basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c); R. Vol. 15 at 131.

BAPCO is authorized to use the BellSouth trademark, and has invested millions of dollars in promoting its directories using that trademark. R. Vol. 17 at 54, 56, 58. BAPCO

customarily places the BellSouth mark on the cover of its directories. *Id.* It is undisputed that "[t]he cover of the phone book is a simple, direct, and very important means to communicate to Tennessee consumers." R. Vol. 15 at 64 (testimony of AT&T witness Richard Guepe).

BAPCO invests considerable time, effort and expense in enhancing its directories. For example, BAPCO endeavors to make the editorial content and layout of its directories both interesting and appealing. R. Vol. 17 at 54-55, 57-58. It also adds value to the "raw" listings by determining appropriate geographic boundaries for each community, adding bold treatment and logos to its white pages listings, and providing "caption" listings that allow large or multi-site businesses to arrange their listings together in an order that is useful to consumers. R. Vol. 16 at 36. Moreover, because many customers find it convenient to use a single directory, BAPCO often publishes white and yellow page listings for a community together in a single book. *Id.* at 37. BAPCO exercises significant editorial control over the organization, appearance, and content of the yellow pages listings. *Id.* at 36, 39.

BAPCO customarily provides competing carriers with ample access to the white pages directories that it publishes on behalf of BST in Tennessee. First, BAPCO includes in the directories, at no charge, listings for the telephone numbers in the covered area that are served by its competitors. R. Vol. 16 at 39. Second, BAPCO publishes information about BST's competitors in customer guide pages within each directory and permits those companies to purchase additional customer guide pages. *Id.* at 39-40. Third, BAPCO prints on the cover of each directory a statement that the book "[i]ncludes customer listings for all local telecommunications companies." *Id.* at 39.

2. AT&T competes with BST for local telephone customers in Tennessee. BAPCO and AT&T entered into a contract in August 1996 for BAPCO to publish and distribute

directories including listings for AT&T's customers in Tennessee. R. Vol. 16 at 43-44. AT&T sought an agreement from BAPCO to publish its name and logo on the cover of BAPCO's directory. *Id.* at 44-45.

After private negotiations failed to produce an agreement, AT&T petitioned the Tennessee Regulatory Authority ("TRA") for an order declaring, under Tennessee law, that white pages directories published for BST by BAPCO must "include the name and logo of AT&T in like manner to the name and logo of BST, or include no company's name and logo." App., *infra*, 5a. Several other competing local exchange companies serving markets in Tennessee – MCI Telecommunications, Inc., American Communications Services, Inc., and Nextlink Tennessee, LLC – applied for and were granted permission to intervene in the proceeding. *Id.*

The TRA conducted a hearing on the petition on July 19, 1997. BAPCO presented undisputed evidence that the directory publishing industry is highly competitive and that it uses the BellSouth mark to brand and differentiate its directories. R. Vol. 16 at 27-50; R. Vol. 17 at 51-81, 90-100. BAPCO also submitted the testimony of an expert witness who had tested consumer reaction to mock directory covers that displayed the names and trademarks of BellSouth, AT&T, and MCI. R. Vol. 17 at 122 – Vol. 18 at 46. A substantial percentage of those surveyed believed that AT&T and MCI were responsible for the publication of the mock directories or were affiliated with BAPCO. R. Vol. 17 at 125-126. The study thus demonstrated that the remedy sought by AT&T would blur BAPCO's individual brand identity and lead to consumer confusion regarding the source of BAPCO's telephone directories. *Id.* at 129-130.

3. On March 19, 1998, the TRA ordered BAPCO to provide AT&T with the opportunity

> to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such direc-

> tories under the same terms and conditions as BAPCO provides to [BST] by contract.

App., *infra*, 154a. In support of that order, the TRA quoted the comments of TRA Chairman Greer. He relied principally on Tenn. Comp. R. & Regs. 1220-4-2-.15 (1997), which mandates the publication of telephone directories and requires that "[t]he name of the telephone utility * * * appear on the front cover." Acknowledging that the rule was enacted when "no more than one utility" served any area, Chairman Greer nonetheless concluded that, under the "logic" of the rule, "if more than one utility's customers are inside the same directory, then more than one utility's name [should] be on the cover." App., *infra*, 150a. Chairman Greer also concluded that including the names of local providers on the cover of the directory would "be helpful to consumers," would "promote competition by showing consumers they have a choice in service providers," and would "allow[] small companies to continue to provide service without the financial burden of having to produce their own directory." *Id.* at 151a.

After the TRA issued its order, Nextlink filed a petition seeking an order requiring BAPCO to include its name and logo on the cover of the directory published by BAPCO in Nextlink's service area. The TRA ruled in favor of Nextlink, concluding that its interpretation of Rule 1220-4-2-.15 "must equally be applied to all similarly situated carriers that seek the same relief." App., *infra*, 166a.

4. BAPCO appealed both orders. Among other things, BAPCO argued that the orders exceeded the TRA's jurisdiction and violated BAPCO's First Amendment rights.

On February 16, 2001, the Tennessee Court of Appeals reversed both orders. App., *infra*, 31a-144a. The majority ruled for BAPCO on both the jurisdictional issue and the First Amendment issue, finding with respect to the constitutional issue that the orders "impose[d] 'forced speech' upon BAPCO in violation of the First Amendment." *Id.* at 54a-

55a, 61a. The court's reasoning with respect to the First Amendment issue was set forth in the concurring opinion of Judge Cain, the relevant portion of which was referenced by the majority opinion and joined by Judge Koch and thus became part of the opinion of the court. *Id.* at 61a.

On the First Amendment issue, the court of appeals stated that "[t]he freedom of speech protected by the [First Amendment] includes [both] the freedom to speak and the freedom to refrain from speaking." App., *infra*, 77a. Citing *Pacific Gas & Electric. Co.* v. *Public Utilities Commission*, 475 U.S. 1, 20 (1986), the court explained that "corporations may not be compelled to use their property or resources to advance the ideological views of others." App., *infra*, 78a. The court acknowledged that in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), this Court held that the government could require a California fruit grower to fund generic advertising helpful to other growers, but it explained that this requirement was merely "the price the competing producers had to pay for the benefit of being protected from free competition in the marketplace." App., *infra*, 79a.[1] The Tennessee court held that *Glickman* was inapplicable to local telephone markets in Tennessee, "because the government is no longer protecting the local telephone service providers from competition." *Id.* at 80a.

The court of appeals thus concluded that BAPCO, and BST, have a "constitutionally protected interest in not being forced to use their own resources, property, or funds to promote the financial interests of their competitors." App, *infra*, 80a. It ruled that the TRA's decision could be upheld only if the orders had a "compelling justification" and were "[no]

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[1] The court of appeals thus anticipated this Court's decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), which confined *Glickman* to industries where the government had "replaced competition with a regime of cooperation." *Id.* at 414.

more extensive than is necessary to advance that interest." *Id.* The court found the TRA's orders invalid under that test.

According to the court of appeals, there was little evidence that "placing the names and logos of BellSouth's competitors on the cover of the white pages telephone directory" would "promote the ability of the public to identify the local telephone service providers who serve the calling area covered by the directory." App., *infra*, 80a-81a. The court noted that "providing this information on the cover * * * would simply be redundant because similar information in much more detail is already included in the directory itself." *Id.* at 81a. Indeed, in the court's view, AT&T's demand that its name and logo appear on the cover "was motivated by the desire to increase the public awareness of its brand without incurring the expense of a marketing campaign." *Id.* "Permitting AT&T to be a free rider in the name of promoting competition goes too far for constitutional purposes." *Id.*

5. The Tennessee Supreme Court reversed, holding that the TRA had jurisdiction to enter its orders and that the orders did not violate the First Amendment. App., *infra*, 1a-30a.

In ruling for the TRA on the First Amendment issue, the Tennessee Supreme Court deemed irrelevant several of this Court's significant decisions regarding commercial speech. First, the court rejected BAPCO's argument that it should be guided by *United States* v. *United Foods, Inc.*, 533 U.S. 405, 410 (2001). In that case, this Court invalidated a regulation requiring that a mushroom producer contribute financially to generic advertising that benefited other producers at the expense of distinguishing its own brand. The court below concluded that this Court's holding in *United Foods* was relevant only to "cases involving compelled *contributions* to speech." App., *infra*, 22a. Here, by contrast, the TRA's orders "effectively require BAPCO to engage in *actual speech*." *Id.*

Second, the Tennessee Supreme Court rejected BAPCO's argument that it should evaluate the TRA's orders under the four-part *Central Hudson* test. According to the court, the *Central Hudson* test applies only to "cases involving *restrictions* on commercial speech," not to "cases involving *compelled* commercial speech or *compelled financial support of commercial speech.*" App., *infra*, 23a.

Instead, the court concluded, "the more forgiving standard set forth by the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985)," is "the defining test for First Amendment analysis of compelled speech cases." App., *infra*, 24a. In the court's view, that test required it to determine, first, "[w]hether the TRA's disclosure requirement is reasonably related to the state's interest in preventing deception of consumers," and, second, "[w]hether the disclosure requirement is unduly burdensome." *Id.* at 25a. The court found that the TRA's orders satisfied this test.

The Tennessee Supreme Court acknowledged that this case differed from *Zauderer* in that "[t]he rules in *Zauderer* * * * compelled attorneys to disclose additional information about themselves, whereas the TRA's orders compel BellSouth to disclose information about the identity of its competitors." App., *infra*, 26a. It concluded, however,

> that [t]he ultimate object of the regulations * * * is the same: to inform consumers. In other words, BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available.

Id. at 26a. The court identified the governmental interest underlying the TRA's order not as preventing deception but as "promoting free competition." *Id.* at 28a. According to the court, the orders would "directly advance competition in the provision of local telephone service by effectively informing

consumers as to the existence of alternative local telephone services." *Id.* at 27a.

Having determined that this governmental interest is "important," the Tennessee Supreme Court proceeded to apply "[t]he second step of the *Zauderer* test" – that is, "to determine whether the TRA's orders are unduly burdensome." App., *infra*, 27a. The court found that the TRA's orders "directly advance the state's interest without imposing an excessive burden." *Id.* at 28a. According to the court, "the government's chosen means to advance its goals * * * does not substantially affect BellSouth's ability to communicate its own speech to customers in the market." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly affirmed the First Amendment rights of corporations to engage in non-misleading speech promoting their commercial activities and to refrain from supporting the messages of their commercial or ideological opponents. Nevertheless, the Tennessee Supreme Court has upheld agency orders requiring a directory publisher to use the cover of its product to promote the commercial messages of unrelated companies. The Tennessee court approved these orders after holding that this Court's many speech-protective precedents are simply irrelevant to cases involving government *compulsion* of commercial speech. Instead, the court adopted as "the defining test for First Amendment analysis of compelled speech cases" the relatively "forgiving" standard established in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), for assessing disclosure requirements that correct otherwise *misleading* commercial speech. It did so despite the absence of any evidence that the directory covers were in fact deceptive to consumers.

The Tennessee Supreme Court is not alone in affording such slight protection to commercial actors' right to engage in truthful and nonmisleading speech without having to include content dictated by the government. Several other

courts also have treated *Zauderer* as supplying the standard for evaluating all governmental compulsion of commercial speech. They thus have upheld compelled commercial speech upon a showing of a reasonable relationship between the speech at issue and a substantial governmental interest. In contrast, other courts have construed this Court's decisions to require that *all* regulations affecting non-misleading commercial speech satisfy the *Central Hudson* test. Accordingly, even in the context of compelled speech, these courts require the government to demonstrate that its regulations are no more restrictive than necessary to serve its legitimate purposes. The Court should grant review to clarify that commercial speech compelled by the government to serve interests other than preventing consumer deception must be scrutinized under a standard no less stringent than *Central Hudson*.

The Court should also grant review to establish unequivocally that the First Amendment protects businesses from having to support, through their own speech, commercial messages with which they disagree. In *United Foods*, this Court made clear that a corporation cannot be required to contribute financially to advertising that benefits its competitors. In *Pacific Gas & Electric Co.*, the Court ruled that a corporation may not be required to carry another speaker's views in communications with its own customers. The principles recognized in these cases plainly are offended by a governmental requirement that BAPCO must carry the trademarks of BST's competitors on the face of the directories that BAPCO publishes for BST. The Tennessee Supreme Court refused to recognize the pertinence of *United Foods* and *Pacific Gas & Electric Co.* to compelled commercial speech and, indeed, gave lesser protection to compelled *speech* than to compelled *contributions to speech*. This case provides an important opportunity for the Court to explain that governmental compulsion of *actual* commercial speech is subject to no less scrutiny under the First Amendment than

the level of scrutiny applicable to compelled financial support of speech.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE FIRST AMENDMENT STANDARD FOR EVALUATING GOVERNMENTAL COMPULSION OF COMMERCIAL SPEECH THAT IS NOT NECESSARY TO PREVENT DECEPTION

A. In *Zauderer*, The Court Acknowledged An Exception To *Central Hudson* For Mandatory Disclosures That Serve The Purpose Of Preventing Consumer Deception.

1. In *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the Court established a general rule requiring the application of intermediate scrutiny to governmental restrictions on truthful speech about lawful commercial activities. The Court described the power to regulate such speech as "circumscribed." *Id.* at 564. According to the Court, the state must assert a "substantial interest" to be served by the restriction, and must select a regulatory method that is both "in proportion to that interest" and "designed carefully to achieve the State's goal." *Id.*

The Court explained:

> First, the restriction must directly advance the state interest involved: the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id. at 564. The Court emphasized that "[t]he State cannot regulate speech that poses no danger to the asserted state interest, * * * nor can it completely suppress information when

narrower restrictions on expression would serve its interest as well." *Id.* at 565.

The *Central Hudson* standard has evolved into a four-part inquiry for evaluating government restrictions on commercial speech. First, the court must determine whether the speech at issue concerns lawful activity and is not misleading. Second, the court asks whether the asserted governmental interest is substantial. 447 U.S. at 566. "If both inquiries yield positive answers" (*id.*), then the court asks, third, whether the regulation "directly and materially advances the asserted governmental interest." *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 188 (1999). "The fourth part of the test complements the direct advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Id.*

Applying this test, the Court in *Central Hudson* found that a ban on promotional advertising by electric utilities violated the First Amendment because the regulation was more extensive than necessary to serve the state's interest in energy conservation. The Court's recent decisions demonstrate that *Central Hudson* imposes substantial limits on the government's ability to impose restrictions on truthful commercial speech. See, *e.g.*, *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1504-1509 (2002) (striking down FDA rule seeking to impose restriction on drug advertising); *Lorillard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2428 (2001) (invalidating restrictions on point-of-sale advertising for tobacco products after concluding that they would be ineffective in achieving their stated purpose); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184 (striking down restriction of casino gambling ads); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996) (striking down statutes prohibiting advertisement of liquor prices); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1994) (invalidating federal statute prohibiting beer labels from displaying alcohol content);

Edenfeld v. *Fane*, 507 U.S. 761, 770-771 (1993) ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). As we discuss further below (see pages 25-26, *infra*), the TRA's order could not have survived scrutiny under the *Central Hudson* test.

2. The Court explained in *Central Hudson* that "[t]he First Amendment's concern for commercial speech is based on the informational function of the advertising." 447 U.S. at 563. In keeping with that concern, while the government's ability to regulate truthful commercial speech was "circumscribed" (*id.* at 564), it was free to "suppress[] * * * commercial messages" that were "more likely to deceive the public than to inform it." *Id.* at 563. The Court has continued to emphasize that the First Amendment "provides constitutional protection for the dissemination of *accurate* and *nonmisleading* commercial messages." *44 Liquormart, Inc.*, 517 U.S. at 496 (emphasis added).

Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), involved commercial speech that was found to have the tendency to mislead its audience. Zauderer, an attorney, had placed an advertisement offering to file suit on behalf of women injured by the Dalkon Shield intrauterine contraceptive device. The advertisement offered to handle such cases under a contingent fee arrangement, stating that "if there is no recovery, no legal fees are owed by our clients." *Id.* at 652. According to the Court, the advertisement suggested that "employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge." *Id.* That was untrue, however, because losing clients would be required to bear certain of their own litigation costs. In these circumstances the advertisement gave rise to a "possibility of deception" that was "self-evident." *Id.*

To avert this risk of deception, the Ohio bar rules required attorneys advertising contingent fee arrangements to disclose in the advertisement the client's obligation to pay costs. Having reiterated that the states and the federal government "are free to prevent the dissemination of commercial speech that is false, deceptive or misleading" (471 U.S. at 638), the Court found that the disclosure requirement easily passed muster under the First Amendment. Observing that disclosure requirements "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," the Court ruled that they are permissible as long as they are "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

The *Zauderer* decision was forecast by the Court's statement in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that the State may require commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, *as are necessary to prevent its being deceptive.*" *Id.* at 772 n.24 (emphasis added). More recently, the Court has reiterated that *Zauderer* supports the compulsion of speech only when the government demonstrates an actual likelihood that consumers will be *misled* absent the required disclosure. See *United Foods*, 533 U.S. at 416 (finding *Zauderer* inapplicable because "[t]here is no suggestion * * * that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers"); *Ibanez* v. *Florida Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) ("[i]f the protections afforded to commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate

them to a material degree") (internal citations and quotation marks omitted).

B. There Is A Split Of Authority Regarding The Relationship Between *Central Hudson* And *Zauderer.*

The lower courts disagree regarding the proper relationship between *Central Hudson* and *Zauderer.* Some courts have held that *Central Hudson* applies only to governmental *limits* on speech, while *Zauderer* applies to all forms of *mandated* speech – whether or not the required speech has the purpose of preventing consumer deception. Other courts have found *Zauderer* applicable only to mandatory factual disclosures that are intended to correct a statement that is demonstrably likely to mislead absent the disclosure. These courts evaluate all other governmental efforts to regulate non-misleading commercial speech – whether they limit or compel such speech – under the more demanding *Central Hudson* standard.

1. The Eleventh Circuit views *Central Hudson* as the touchstone for measuring all efforts to regulate non-misleading commercial speech, including both restrictions on speech and requirements to speak. That court has applied *Zauderer* only once it has determined that speech would be misleading absent the disclosure mandated by the government.

In *Mason* v. *Florida Bar*, 208 F.3d 952 (11th Cir. 2000), for example, the court evaluated the constitutionality of a disclosure requirement imposed on an attorney by the state Bar. The attorney had included in an advertisement the truthful statement that he had received the highest rating issued by Martindale-Hubbell. The Bar insisted that his advertisement also include, among other things, "a full explanation as to the meaning of the * * * rating and how the publication chooses the participating attorneys." *Id.* at 954.

The Eleventh Circuit "determined from the outset that Mason's speech, as truthful information, [was] protectable commercial speech" (208 F.3d at 955) and could be regulated only if *Central Hudson*'s criteria were satisfied. The court concluded that the disclosure requirement failed that test because it did not serve a substantial government interest. Observing that "[u]nfamiliarity is not synonymous with misinformation," the court held that the general public's unfamiliarity with Martindale-Hubbell's rating systems "does not justify imposition of a disclaimer requirement on Mason's truthful advertisement." *Id.* at 957.

The Eleventh Circuit expressly rejected the Bar's argument, under *Zauderer*, that the restriction "should be upheld because it has not insisted upon an outright ban on speech, but merely required the use of a disclaimer." *Id.* at 958. The court stated that "[e]ven partial restrictions on commercial speech must be supported by a showing of some identifiable harm." *Id.* See also *Borgner* v. *Brooks*, 284 F.3d 1204 (11th Cir. 2002), petition for cert. filed, No. 02-165 (July 29, 2002) (evaluating under the *Central Hudson* test a state law requiring disclaimers in certain advertisements by dentists); *Tillman* v. *Miller*, 917 F. Supp. 799, 801 (N.D. Ga. 1995) (invalidating statute requiring attorney advertisements for worker's compensation services to include notice regarding criminal penalties for filing false claims; the court distinguished *Zauderer* by noting that, under the statute, "the advertiser is compelled to speak to protect the public good from fraud or deception by listeners, not by the advertiser"), aff'd, 133 F.3d 1402, 1403 (11th Cir. 1998) (per curiam).

Like the Eleventh Circuit, the Minnesota Supreme Court has applied *Central Hudson* to compelled speech that is not aimed at preventing consumer deception. In *State* v. *Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992), the court struck down under *Central Hudson* a requirement that telemarketers employ live operators to make disclosures and obtain consent before playing tape-recorded messages.

2. In contrast, the Tennessee Supreme Court held in this case that *Zauderer*, not *Central Hudson*, is "the defining test for First Amendment analysis of compelled speech cases." App., *infra*, 24a. The court below recognized that by ordering the co-branding of BAPCO's directory the TRA intended to promote competition, not prevent deception. *Id.* at 26a, 28a. Nevertheless, it applied to the mandatory co-branding of BAPCO's directory the "forgiving" standard established in *Zauderer* for evaluating mandatory disclosures aimed at preventing consumer deception. *Id.* at 24a. Accordingly, it upheld the TRA's orders without determining – as it would have been required to do under *Central Hudson* – whether the compelled disclosures materially advanced the state's interest or were "more extensive than is necessary to serve [that] interest." 447 U.S. at 566. See also *Walker* v. *Board of Prof'l Responsibility*, 38 S.W.3d 540, 545 (Tenn. 2001) (ruling that *Central Hudson* applies only to restrictions on speech and that "the less rigorous *Zauderer* standard" applies to governmental regulations that compel commercial speech); *Douglas* v. *State*, 921 S.W.2d 180 (Tenn. 1996) (upholding under *Zauderer* requirement that dentists include disclosures concerning board certification in their advertisements).

Other lower courts also have reflexively applied *Zauderer* to all cases of compelled commercial speech, even when there is no risk that consumers will be misled by the advertisements in the absence of the compelled disclosures. See, *e.g.*, *U S West Communications, Inc.* v. *Thoms*, 1999 WL 33456553, at *29 (S.D. Iowa Jan. 25, 1999) (upholding under *Zauderer* a regulatory order requiring incumbent telephone company to "brand" network service elements provided to competitors); *Kleese* v. *Pennsylvania State Bd. of Funeral Directors*, 738 A.2d 523, 526 (Pa. 1999) (holding that *Zauderer*, not *Central Hudson*, applies to requirement that funeral home include name of permanent supervisor in newspaper advertisements); *Harris* v. *Agency for Health*

Care Admin., 671 So. 2d 230, 231-232 (Fla. Dist. Ct. App. 1996) (holding that *Zauderer*, not *Central Hudson*, should be used to evaluate requirement that therapist include the words "licensed mental health counselor" on promotional materials).

3. The Second Circuit has been of two minds on this question – and its inconsistent decisions illustrate well the lower courts' divergent approaches to compelled commercial speech. Initially, it held that *Central Hudson* provided the standard for evaluating disclosure requirements unrelated to the prevention of deception. Thereafter, however, the court reversed course and concluded that *all* disclosure requirements should be evaluated under *Zauderer*.

The first of these decisions was *International Dairy Foods Association* v. *Amestoy*, 92 F.3d 67 (2d Cir. 1996) ("*IDFA*"). There, the court struck down under *Central Hudson* a Vermont statute requiring dairy manufacturers to disclose on the labels milk products derived from cows treated with a synthetic growth hormone. Observing that "[t]he right not to speak inheres in political and commercial speech alike," and "extends to statements of fact as well as statements of opinion" (*id.* at 71), the court treated *Central Hudson* as establishing the "constitutional requirements applicable to compelled commercial speech." *Id.* at 72.

The Second Circuit found that the labeling requirement failed to satisfy *Central Hudson* because the asserted interests in the labeling requirement – "strong consumer interest and the public's 'right to know'" – were "insufficient to justify compromising protected constitutional rights." 92 F.3d at 73. The court explained that consumer curiosity was "insufficient to permit the State of Vermont to compel the dairy manufacturers to speak against their will." *Id.* at 74. "Were consumer interest alone sufficient," the court added, "there is no end to the information that states could require manufacturers to disclose about their production method." *Id.*

More recently, however, the Second Circuit held in *National Electrical Manufacturers Association* v. *Sorrell*, 272 F.3d 104 (2d Cir. 2001), cert. denied, 122 S. Ct. 2358 (2002) ("*NEMA*"), that *Zauderer* applies to all compelled commercial disclosures, whether or not the disclosure has the purpose of preventing deception. The statute at issue in *NEMA* required manufacturers of mercury-containing products to label their products and packaging to inform consumers that the products contained mercury and, on disposal, should be recycled or disposed of as hazardous waste. This time, the court ruled squarely that

> *Zauderer*, not *Central Hudson* * * *, describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that *restrict* commercial speech.

Id. at 115.[2]

The Second Circuit acknowledged that "the compelled disclosure at issue [in *NEMA*] was not intended to prevent 'consumer confusion or deception' per se, * * * but rather to better inform consumers about the products they purchase." 272 F.3d at 115. Nonetheless, citing *Zauderer*, the court held that the First Amendment was satisfied by a "rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose." *Id.*

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[2] The Second Circuit acknowledged that it had applied the *Central Hudson* test in *IDFA*, but contended that its decision was "expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'" 272 F.3d at 115 n.6.

C. *Zauderer*'s "Rational Relationship" Test Should Apply Only When The State Requires Disclosure To Prevent A Genuine Risk Of Consumer Deception.

This case provides the Court with the opportunity to eliminate the confusion between the *Central Hudson* and *Zauderer* tests in the frequently recurring context of compelled commercial speech that does *not* serve the purpose of preventing consumer deception. Deciding this case will permit the Court to explain whether all compulsion of commercial speech is subject to a "reasonable relationship" test, such as the Court applied to the mandatory disclosure in *Zauderer*, or whether that test applies only to factual disclosures that reduce a genuine risk of consumer deception otherwise created by the associated commercial speech.

1. The Tennessee Supreme Court erred in concluding that a "rational relationship" test taken from *Zauderer* defines "the First Amendment analysis of [all] compelled speech cases." App., *infra*, 24a. By its own terms, the *Zauderer* test applies only to mandated disclosures that serve the government's "interest in preventing deception of consumers" caused by the commercial speech itself. 471 U.S. at 651. The Court found it "self-evident" that the attorney advertisement at issue in *Zauderer* was likely to mislead consumers by causing them to believe that an unsuccessful lawsuit would cost them nothing when in fact they would bear their own costs. Having previously stated that the government may simply "ban forms of communication more likely to deceive the public than to inform it" (*Central Hudson*, 447 U.S. at 563), it is not surprising that the Court readily approved a mandatory disclosure designed to prevent such deception.

Nothing in the Court's decisions, however, suggests that *Zauderer* should apply, across the board, to every regulation that mandates commercial speech. As noted above (at page 15), the Court has repeatedly cautioned – as recently as last

year, in *United Foods* – that *Zauderer* does not apply unless the state demonstrates an actual likelihood that consumers will be misled absent the disclosure. In other contexts, this Court has recognized that the freedom *not* to speak can be as important as the freedom *to* speak. See, *e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). The Court has also made clear that corporations, like individuals, have a right not to disseminate messages with which they disagree. *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

Regulations that require speech can burden First Amendment freedoms at least as much as restrictions on speech. That is clearly demonstrated by the TRA's orders, which by mandating the publication of the logos of other companies strip BAPCO of its ability to use the covers to identify, differentiate, and promote its own brand of directories. Indeed, as this case shows, compulsion and restriction of speech are two sides of the same coin. To the extent that BAPCO is *compelled* to print the logos of other companies alongside its own trademark, it is flatly *barred* from identifying its directories by its mark alone. See *Pacific Gas & Elec. Co.*, 475 U.S. at 15 (order forcing public utility to carry opposing messages in its customer correspondence "necessarily burdens the expression" of the utility). Thus, in this case the compelled speech interferes substantially with "the free flow of commercial information" that is "indispensable to the proper allocation of resources in a free enterprise system." *Coors Brewing Co.*, 514 U.S. at 481-482 (internal quotation marks omitted).

Accordingly, the "reasonable relationship" test provides insufficient protection to the right to engage in truthful and non-misleading commercial speech. Were it enough for the state to demonstrate a "reasonable relationship" with *any* legitimate governmental interest, there would be no end to the

disclosures, statements, and other messages that the government could append to lawful commercial speech. Again, this case proves the point, because an administrative agency has effectively assumed editorial control over the cover of a private company's principal product line to serve an ostensible public interest in promoting competition in a recently deregulated industry.

Except when necessary to prevent a commercial message from misleading consumers, governmental compulsion of commercial speech should be subject to scrutiny that is no less stringent than the standard set forth in *Central Hudson.* Just as when it *limits* speech, the state's ability to prescribe content for commercial messages should be no broader than is necessary to serve its substantial and legitimate interests.

2. Under a proper understanding of *Zauderer*, the Tennessee Supreme Court had no basis for applying its "reasonable relationship" test to the TRA's orders. First, at no point did the TRA find that BAPCO's covers were *misleading* to consumers. See TRA's Application for Permission to Appeal, at 14 n.17 (conceding that the speech at issue was "not misleading"). Second, the TRA ordered a remedy that was far more intrusive than the factual disclosure considered in *Zauderer*.

As noted above, BAPCO is authorized to, and regularly does, use the BellSouth trademark to identify and differentiate its directories. R. Vol. 17 at 54, 56, 58. BAPCO, and BAPCO alone, designs, publishes, and distributes these directories to consumers. Thus, BAPCO's use of the BellSouth trademark on its directory *accurately* conveys to consumers important information concerning its source. Indeed, precluding BAPCO from branding its directory with the BellSouth trademark – and only that trademark – prevents BAPCO from differentiating its product from competing directories. This limitation on BAPCO's ability to use its own brand to identify its directories deprives consumers of information

that would help them choose among competing directory products. The mandatory co-branding also *inhibits* competition by depriving BAPCO – and ultimately the other directory publishers that may be affected by the TRA's orders – of the benefits of creating a superior product. This reduces the incentives for continued product improvement.

In fact, the TRA's orders would *create* rather than eliminate consumer confusion. BAPCO presented undisputed empirical evidence that including the logos of unrelated companies on directory covers would cause consumers to believe that those other companies had published the directories. R. Vol. 17 at 125-126. There also was evidence that customers would interpret the cover to mean that BAPCO and the other companies were related. *Id.* Accordingly, the key value underlying the Court's commercial speech cases – ensuring that private economic decisions are "intelligent and well informed" (*Virginia Bd. of Pharmacy*, 425 U.S. at 765) – would be *undermined* by the TRA's orders.

Moreover, the TRA did not order a straightforward factual disclosure of the type at issue in *Zauderer*. A "disclosure" in the Court's cases is a statement of fact conveying an uncontroversial message. For example, the statement (which already appears on BAPCO's directory covers, see page 4, *supra*) that the book contains numbers served by all competing carriers is such a disclosure. By contrast, the TRA ordered BAPCO to carry the commercial symbols of BST's competitors on the cover of its product. That is not a factual statement, but a forced association with competing brands that would undermine BAPCO's efforts to convey to consumers that there is a *difference* between its directories and those published by other companies.

Finally, in *Zauderer* the disclosure provided additional information *about the speaker* (*i.e.*, the cost of his services) that was directly relevant to the commercial speech at issue. Here, BAPCO was required to provide information about

other companies, not directly relevant to the speech at issue, in order to enhance the ability of those other companies to compete against BST. *Zauderer* plainly does not allow the government to override a corporation's First Amendment right *not* to speak merely upon establishing a "reasonable relationship" to a legitimate state interest.

3. At a minimum, as a substantial restriction of lawful commercial speech, the TRA's orders should have been subject to the *Central Hudson* test. The orders clearly fail the third and fourth prongs of that test because, even assuming the asserted governmental interest is substantial, the TRA's orders do not "directly advance[]" that interest and are "more extensive than is necessary to serve that interest." 447 U.S. at 566.

The Tennessee Supreme Court stated that the goal of the TRA's ruling was to "inform[] consumers about their choices in the local telecommunications service market." App., *infra*, 28a. Even assuming that the government may legitimately mandate speech by one competitor to serve the interests of another, the co-branding of BAPCO's white pages directory does not further that goal. To the contrary, the appearance of multiple companies on the cover would suggest to many consumers that the companies are related or are providing phone service together in some sort of joint venture that does not create consumer choice.

In addition, other measures both more effective and less burdensome than the co-branding of BAPCO's directory could be used to inform consumers that they have a choice among local telephone service providers. A statement on the cover that the directory includes numbers served by all of the competing carriers would suffice, as would the inclusion of information about competitors within the directory. Of course, competing phone companies also can and do use many other avenues – including traditional advertising, direct

mail, and the distribution of their own directories – to publicize their services.

At the end of the day, the TRA made no effort to "carefully calculate[] the costs and benefits associated with the burden on speech" imposed by its order, as the First Amendment requires. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (internal quotation marks omitted). The TRA simply decided that the "logic" of a long-outdated rule required the cover of a telephone directory to include the names and logos of the companies serving the telephone numbers within it. App., *infra*, 150a. It then concluded, almost as an afterthought and without evidentiary support, that this would be helpful to consumers and would promote competition. *Id.* at 151a. That is hardly enough to justify the TRA's severe restriction of BAPCO's First Amendment right to use the cover of its book as a vehicle for its own, and BST's – and not their competitors' – commercial messages.

II. THE COURT SHOULD GRANT REVIEW TO AFFIRM THE FIRST AMENDMENT RIGHTS OF CORPORATIONS *NOT* TO CARRY THE MESSAGES OF THEIR COMMERCIAL COMPETITORS

The TRA's orders represent an extreme intrusion upon the First Amendment because they require BAPCO to use the cover of its telephone directories to promote the brands of BST's competitors rather than to differentiate and publicize its individual brand. This Court has acknowledged that the First Amendment protects the rights of corporations not to utter the political messages of their opponents or to support the commercial messages of their economic competitors. This case provides the Court with an opportunity to explain the significance of these principles in cases involving compelled commercial speech.

1. In *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1, 15 (1986), the Court ruled in a plurality opinion that a corporation has the right not to "associate with speech with which [it] may disagree" and thus could not be compelled to carry the controversial messages of a third party. Accordingly, the Court struck down an order of the Public Utility Commission requiring a privately owned utility company to carry within its billing envelope a newsletter published by a citizen's group that was sometimes critical of the utility.

The Court explained that "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." 475 U.S. at 16. Thus, to require the utility "to use *its* property as a vehicle for spreading a message with which it disagrees" seriously impinged on the utility's First Amendment rights. *Id.* at 17. Although the utility had no right "to be free from vigorous debate," it *did* "have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Id.* at 14. As a result, the Court ruled that the government could support a "content-based grant of access to [the speaker's] private property" only by demonstrating that its order was narrowly tailored to serve a *compelling* governmental interest. *Id.* at 16-17. Because the state could further its interest "through means that would not violate [the utilities'] First Amendment rights" (*id.* at 19), the Court held the requirement at issue to be unconstitutional.

The Court in *Pacific Gas & Electric* also made clear that the government's "substantial leeway in determining appropriate information disclosure requirements for business corporations" did not support the Commission's order.

> Nothing in *Zauderer* suggests * * * that the State is equally free to require corporations to carry the messages of third parties, where the messages them-

> selves are biased against or expressly contrary to the corporation's views.

475 U.S. at 911 n.12. See also *Central Illinois Light Co.* v. *Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987) ("While *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their ideological opponents").

Pacific Gas & Electric disapproved the compulsion of public speech by a corporation in support of its opponents, while the TRA has compelled BAPCO to publish commercial messages with which it disagrees. As we discuss further below, however, First Amendment rights are strongly implicated by the forced support of commercial, as well as political, messages. Just last year, this Court held that the First Amendment prevents the government from forcing a corporation to provide *financial support* for a purely commercial message with which it disagrees. Drawing lessons from *Pacific Gas & Electric*, the Court should hold that the government must meet an exacting standard – certainly, one no less stringent than *Central Hudson* – when it requires corporations to convey the commercial messages of their economic competitors.

2. The Court's ruling in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), makes clear that the First Amendment fully protects the rights of corporations not to provide financial support for commercial messages that they oppose. The Tennessee Supreme Court, however, dismissed as "inapposite" *United Foods* and the Court's other decisions concerning compelled contributions to speech, because the TRA orders "effectively require BAPCO to engage in *actual speech*." App., *infra*, 22a.

In *United Foods*, the Court ruled that the government could not require a mushroom producer wishing to tout the superiority of its own brand to fund generic mushroom ad-

vertising. The Court recognized that commercial messages promoting a product are significant to the speaker and protected by the First Amendment. As the Court explained:

> The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.

533 U.S. at 410. Accordingly, requiring a producer to subsidize advertisements promoting mushrooms in general, rather than its own brand, triggered First Amendment concerns because the producers were being required to "subsidize speech with which they disagree." *Id.* at 411. Noting that the mushroom producer "objected to being charged for * * * [t]he message * * * that mushrooms are worth consuming whether or not they are branded," the Court added:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom.

Id.

The principles recognized in *United Foods* compel the conclusion that BAPCO has a powerful First Amendment right *not* to be required to dilute its own commercial message by sharing its directory cover with the logos of BST's competitors. The Tennessee court deemed *United Foods* to be inapplicable because it concerned contributions to speech rather than actual speech. But to treat compelled *actual*

speech as entitled to less First Amendment protection than compelled *contributions* to speech is indefensible. A government requirement that BAPCO stamp its chief vehicle for identifying and promoting its product with the brand names and logos of BST's competitors plainly invades BAPCO's First Amendment freedoms *more*, not less, than would a compelled subsidy of advertising by those competitors. See *United Foods*, 533 U.S. at 413 (suggesting that to be "required simply to support speech by others" is *less* burdensome than a requirement "to utter the speech itself"); *Pacific Gas & Elec. Co.*, 475 U.S. at 16-17 (explaining that a "content-based grant of access to private property" creates a "danger that the government may not impose absent a compelling interest").

Moreover, *United Foods* confirms that the *Zauderer* standards, which the Tennessee Supreme Court elected to apply, have no bearing on this case. In *United Foods*, the Court ruled that *Zauderer* was inapplicable because "[t]here is no suggestion in the case * * * that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers." 533 U.S. at 416. Here, too, the agency conceded that the mandatory co-branding of BAPCO's directory was not necessary to make them nonmisleading to consumers. See TRA's Application for Permission to Appeal, at 14 n.17. In sum, the court below plainly erred in applying *Zauderer* rather than *United Foods* to the TRA's orders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
February 7, 2002 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY

Appeal from the Court of Appeals, Middle Section
Tennessee Regulatory Authority at Nashville
No. 96-01692

No. M1998-01012-SC-RII-CV

AND

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. NEXTLINK TENNESSEE

Appeal from the Court of Appeals, Middle Section
Tennessee Regulatory Authority at Nashville
No. 98-00654

No. M1998-00987-SC-R11-CV

This consolidated appeal presents two very important issues. They are: (1) whether the Tennessee Regulatory Authority has the authority to require that the names and logos of local telephone service providers who compete with BellSouth Telecommunications, Inc. be included on the cover of white pages telephone directories published by BellSouth Advertising & Publishing Corporation on behalf of BellSouth Telecommunications, Inc.; and (2) whether the Tennessee Regulatory Authority's decisions in these consolidated cases violate the First Amendment of the Constitution of the United States. For the reasons discussed herein, we hold that

the Tennessee Regulatory Authority is authorized to require that the names and logos of competing local telephone service providers be included on the covers of the white pages telephone directories published on behalf of BellSouth Telecommunications, Inc., and that the Tennessee Regulatory Authority's decisions in these two cases do not violate the First Amendment. Accordingly, we reverse the judgment of the Court of Appeals in this consolidated appeal and reinstate the judgments of the Tennessee Regulatory Authority.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed

ADOLPHO A. BIRCH, JR., J., delivered the opinion of the court, in which FRANK DROWOTA, III, C.J., E. RILEY ANDERSON, JANICE M. HOLDER, AND WILLIAM M. BARKER, JJ. joined.

J. Richard Collier and Julie M. Woodruff, Nashville, Tennessee, for the appellant, Tennessee Regulatory Authority.

Henry Walker, Nashville, Tennessee, for the appellants, AT&T Communications of South Central States, Inc., MCI Worldcom Network Services, Inc., and XO Tennessee, Inc.

Paul S. Davidson and Guilford F. Thornton, Jr., Nashville, Tennessee, Daniel J. Thompson, Jr., Tucker, Georgia, and James F. Bogan, III, Atlanta, Georgia, for the appellee, BellSouth Advertising & Publishing Corporation.

OPINION

I. Facts and Procedural History

Prior to June 1995, local telephone services in Tennessee were sold to the consumer by monopoly providers. Provision of those services changed dramatically, however, with the Tennessee General Assembly's enactment of 1995 Tenn. Pub. Acts 408 (effective June 6, 1995) (Chapter 408), which comprehensively reformed the rules under which providers of telephone services operate in Tennessee. One of the more notable changes effected by the enactment of Chapter 408

was the abolition of monopolistic control of the local telephone service market and the initiation of open-market competition in the provision of local telephone service.

Under the above-cited telecommunications statute, any local telephone service provider who operated as a monopoly under the prior system was thenceforth designated as an "incumbent local exchange telephone company." Likewise, any telecommunications company providing local telephone services in competition with the incumbent local exchange telephone company was designated as a "competing local exchange telephone company."

BellSouth Telecommunications, Inc. (BellSouth), under its former name, South Central Bell, operated as a monopoly in providing local telephone service in Tennessee markets prior to the enactment of Chapter 408. BellSouth, therefore, is an incumbent local exchange telephone company for purposes of the new state and federal laws. Under the former regulatory system, BellSouth was required to publish for each service area a "white pages" telephone directory listing all telephone subscribers within the area. Tenn. Comp. R. & Regs. 1220-4-2-.15 (1999). That obligation continues under the new regulatory scheme. *Id.*; Tenn. Code Ann. § 65-4-124(c) (Supp. 2001). *See also* 47 U.S.C.A. § 271(c)-(2)(B)(viii) (West Supp. 2001).[1]

In order to fulfill its obligation to publish a white pages directory, BellSouth contracted with BellSouth Advertising & Publishing Corporation (BAPCO). BAPCO publishes "white pages" and "yellow pages" directories for BellSouth in many different markets. While BellSouth and BAPCO are

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[1] Section 271(c)(2)(B)(viii) requires any Bell operating company (which includes BellSouth) that seeks to enter the long distance market to list customers of competing local exchange carriers in its white pages directory listings.

separate corporations, both are parts of BellSouth Corporation. The "**BELL**SOUTH" logo is the only logo printed on the white pages and yellow pages directories published by BAPCO for BellSouth.

A. The AT&T Proceeding

AT&T Communications of South Central States, Inc. (AT&T), a competing local exchange telephone company, negotiated an "interconnection agreement" with BellSouth as was permitted under the new regulations. *See* Tenn. Code Ann. § 65-4-124(a) (Supp. 2001). As to any issues relating to the telephone directories BAPCO published for BellSouth, however, BellSouth required AT&T to negotiate with BAPCO.

AT&T then opened negotiations with BAPCO for the purpose of including its subscribers within BellSouth's white pages and its name or logo on the cover of the white pages directories in areas in which AT&T competes with BellSouth in the provision of local telephone services. They reached an agreement and entered into a contract in August 1996 on all terms except the directory-cover issue, which was omitted from the contract.

At the time, the Tennessee Regulatory Authority (TRA), pursuant to the federal act, was conducting an arbitration proceeding pertaining to certain issues that had arisen in the implementation of the new competitive system. AT&T filed a petition in the arbitration proceeding asking the TRA to require BAPCO to place AT&T's name and logo on BellSouth's white pages directory covers. In turn, BAPCO filed a petition asking the TRA to declare that BAPCO was not subject to the TRA's jurisdiction and that issues relating to the publication of telephone directories were beyond the scope of the arbitration proceeding, which was governed by federal law. On October 21, 1996, the TRA formally declined to address the issue, finding that "private negotiations are the preferred method of resolving this issue."

On December 16, 1996, after further negotiations had proved fruitless, AT&T filed a petition with the TRA seeking a declaratory order as to the applicability of Tenn. Code Ann. §§ 65-4-104, -117(3), -122(c), and Tenn. Comp. R. & Regs. 1220-4-2-.15 to the white pages directories published by BAPCO on behalf of BellSouth. In its petition, AT&T asked the TRA to join BellSouth and BAPCO as parties to the proceeding, to conduct a contested case hearing on the petition, and to declare that "telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as [BellSouth]; and that the covers of directories, published and distributed by BAPCO on behalf of [BellSouth] which include the names and numbers of customers of AT&T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT&T in like manner to the name and logo of [BellSouth], or include no company's name and logo, including 'BellSouth.'"

The TRA voted to convene a contested case hearing and formally made BellSouth and BAPCO parties to the proceeding.[2] The TRA subsequently granted petitions to intervene filed on behalf of MCI Telecommunications, Inc., American Communications Services, Inc., and Nextlink Tennessee, LLC ("Nextlink"), which, like AT&T, are competing local exchange telephone companies serving various local markets in Tennessee.[3]

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[2] Both BellSouth and BAPCO participated in the AT&T declaratory order proceeding before the TRA. BellSouth, however, did not enter an appearance in the pending appeals.

[3] MCI Telecommunications, Inc., and Nextlink Tennessee, LLC now operate under new names, MCI WORLDCOM Network Services, Inc. and XO Tennessee, Inc., respectively. For purposes of clarity, each company is referred to in this opinion by the name it had at the time of the administrative proceedings.

After conducting a contested case hearing and considering the testimony and exhibits admitted into evidence, the TRA, in a 2 to 1 decision, ruled in favor of AT&T. In the written declaratory order issued by the majority, it declared that:

> BAPCO, in the publication of basic White pages directory listings on behalf of BellSouth, is required to comply with the directives of the [TRA] and the provisions of Authority Rule 1220-4-2-.15. Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT&T in a just and reasonable manner.

The dissenting TRA Director stated in a separate opinion that he agreed with the majority that the names and logos of competing local exchange telephone companies should be placed on the front cover of the directories published by BAPCO on behalf of BellSouth. He concluded, however, that the rule relied upon by the majority (Rule 1220-4-2-.15), which was promulgated during the time of monopoly local telephone service, did not apply to the new competitive system and that the TRA should initiate a rulemaking proceeding to amend the rule to require that competitors' names and logos appear on the white pages directory covers. BAPCO appealed the decision to the Court of Appeals.[4]

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[4] *See* Tenn. Code Ann. § 4-5-322(b)(1) (1998) (stating, in pertinent part, "A person who is aggrieved by any final decision of

(cont'd)

B. The Nextlink Proceeding

While the appeal of the AT&T proceeding was pending in the Court of Appeals, Nextlink requested that BAPCO include Nextlink's name and logo on the cover of the white pages directory published by BAPCO for Nextlink's service area. BAPCO denied that request. Nextlink subsequently filed a petition asking the TRA for a declaratory order on the issue. Nextlink asked the TRA to order BAPCO to comply with Rule 1220-4-2-.15 as interpreted in the declaratory order entered in the AT&T proceeding. Nextlink asserted that BAPCO is required to afford *all* competing local exchange telephone companies the opportunity to appear on white pages directory covers in their service areas as a result of the TRA's interpretation of the rule in the AT&T declaratory order.

After hearing oral arguments by the parties, the TRA ruled in favor of Nextlink.[5] In pertinent part, it concluded that its interpretation of Rule 1220-4-2-.15 in the AT&T proceeding "must be equally applied to all similarly situated carriers that seek the same relief." The TRA directed BAPCO "to comply with TRA Rule 1220-4-2-.15, as interpreted in its Declaratory Order entered on March 19, 1998 [the AT&T declaratory order]."

(... cont'd)

the Tennessee regulatory authority . . . shall file any petition for review with the middle division of the court of appeals.").

[5] Like the AT&T declaratory order, the Nextlink order was the result of a 2 to 1 vote. The dissenting TRA Director in the Nextlink proceeding "voted not to support the decision of the majority because the Declaratory Order [from the AT&T proceeding] interpreting TRA Rule 1220-4-2-.15 [was] currently pending before the Court of Appeals[.]"

BAPCO appealed the decision to the Court of Appeals. The appeals of the AT&T and Nextlink proceedings were argued separately in the Court of Appeals, although the court subsequently consolidated the two appeals.[6]

The Court of Appeals reversed the two declaratory orders entered by the TRA. A majority of the three-judge panel agreed that the TRA had exceeded its authority under state law in ordering BAPCO to include the names and logos of competing telecommunications companies on the covers of the white pages directories published by BAPCO for BellSouth. The two-judge majority agreed also that the TRA's declaratory orders violated the First Amendment. In a dissenting opinion, the third member of the panel concluded that the TRA's decisions in these two cases were authorized by state law and did not violate First Amendment principles.

The TRA applied to this Court for permission to appeal pursuant to Tenn. R. App. P. 11, and we granted the application. On appeal, we must address two issues: (1) whether the TRA has the authority to require that the names and logos of "competing local exchange telephone companies" be included on the cover of white pages telephone directories published on behalf of BellSouth; and (2) whether imposing such a requirement violates the First Amendment of the United States Constitution.[7] After a

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[6] The Court of Appeals stated in the Nextlink case: "Because of the substantial similarity of the issues, this appeal will be consolidated for consideration with *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Auth.*, No. 01A01-9805-BC-00248. However, both appeals shall maintain their separate appeal numbers and papers filed in either of these appeals shall bear the appeal number of the proceeding in which they are filed."

[7] The Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322(h) (1998), sets forth the analysis to be applied when (cont'd)

painstaking review of the voluminous record and a thorough consideration of the issues, we hold that (1) the TRA is authorized to require that the names and logos of competing local exchange telephone companies be included on the cover of white pages directories published on behalf of BellSouth;

(... cont'd)

reviewing decisions of administrative agencies. Section 4-5-322(h) provides:

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5) Unsupported by evidence which is both substantial and material in the light of the entire record.
>
> In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Although BAPCO refers to all five subsections of the above-quoted statute in its brief, the pertinent provisions for purposes of the consolidated appeal are Tenn. Code Ann. §§ 4-5-322(h)(1) and -322(h)(2) – in other words, we must determine whether, under those subsections, the TRA's decisions either were "in violation of constitutional ... provisions" or "in excess of the statutory authority of the agency" and subject to reversal or modification for those reasons.

and (2) the TRA's decisions in these two cases do not violate the First Amendment. Accordingly, the judgment of the Court of Appeals is reversed, and the judgments of the TRA are reinstated.

II. Authority of the Tennessee Regulatory Authority

We address first the question whether the TRA has the authority to require that the names and logos of competing telephone companies be included on the cover of white pages directories published on behalf of BellSouth. In defining the authority of the TRA, this Court has held that "[a]ny authority exercised by the [TRA] must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power." *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977). The primary grant of authority to the TRA is located at Tenn. Code Ann. § 65-4-104 (Supp. 2001), the provision defining the TRA's general jurisdiction. The statute provides, in pertinent part, that "the authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." *Id.* In the exercise of this general power, Tenn. Code Ann. § 65-4-117 provides, "[T]he authority has the power to . . . [a]fter hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility[.]" Tenn. Code Ann. § 65-4-117(3) (Supp. 2001).

In construing these provisions, we are guided both by statute and by the prior decisions of this Court. At the outset,

> This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or

> chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

Tenn. Code Ann. § 65-4-106 (Supp. 2001). In addition, this Court has held that the issue whether an administrative agency's action is explicitly or implicitly authorized by the agency's governing statute "is a question of law, not of fact, and this Court's role is to interpret the law under the facts of the case." *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995). Moreover, this Court has observed:

> [T]he General Assembly has charged the TRA with the "general supervisory and regulatory power, jurisdiction and control over all public utilities." Tenn. Code Ann. § 65-4-104 (1997 Supp.). In fact, the Legislature has explicitly directed that statutory provisions relating to the authority of the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] . . . shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction. . . ." Tenn. Code Ann. § 65-4-106 (1997 Supp.). The General Assembly, therefore, has "signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." *Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n*, 844 S.W.2d 151, 159 (Tenn. App. 1992). To enable the TRA to effectively accomplish its designated purpose – the governance and supervision of public utilities – the General Assembly has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules of practice before the authority, together with forms and instructions," and "rules implementing, interpreting or

> making specific the various laws which [the TRA] enforces or administers." Tenn. Code Ann. § 65-2-102(l) & (2) (1997 Supp.).

Consumer Advocate Div. v. Greer, 967 S.W.2d 759, 761-62 (Tenn. 1998).

Thus, in sum, we interpret the statutes governing the TRA's authority *de novo* as a question of law, and we construe the statutes liberally to further the legislature's intent to grant broad authority to the TRA.

A. Chapter 408

In Section I of Chapter 408, the General Assembly outlined the public policy underlying the new regulatory scheme which, as stated earlier, altered in a most significant manner the telecommunications industry in Tennessee:

> **Declaration of telecommunications services policy.** The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. § 65-4-123 (Supp. 2001).

Another section of Chapter 408, now codified at Tenn. Code Ann. § 65-4-124 (Supp. 2001), provides, in pertinent part:

> (a) All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.
>
> (b) Prior to January 1, 1996, the commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers.
>
> (c) These rules shall also ensure that all telecommunications services providers who provide basic local exchange telephone service or its equivalent provide each customer a basic White Pages directory listing. . . .

Two of the provisions in Tenn. Code Ann. § 65-4-124 are especially relevant to the pending cases: subparagraph (b) requires the TRA to "promulgate rules *and issue such orders as necessary* to implement the provisions of subsection (a)" (emphasis added); and subparagraph (c) requires the TRA to "ensure that all telecommunications services providers who provide basic local exchange telephone service . . . provide each customer a basic White Pages directory listing. . . ."

The TRA relies on the two foregoing provisions of Chapter 408 (Tenn. Code Ann. §§ 65-4-123 and -124) to support its contention that its declaratory orders did not

exceed the agency's statutory authority. In addition to its reliance upon the above-enumerated statutes, the TRA relies upon Rule 1220-4-2-.15 as its authority for the declaratory orders issued in the case under submission. Mindful of the provisions of Chapter 408, we now consider Rule 1220-4-2-.15 in the context of TRA's contentions.

B. Rule 1220-4-2-.15

This rule was originally promulgated by the TRA's predecessor agency, the Public Service Commission, long before the enactment of Chapter 408.[8] The rule provides, in pertinent part:

> 1220-4-2-.15 DIRECTORIES-ALPHABETICAL LISTING (WHITE PAGES)
>
> (1) Telephone directories shall be regularly published, listing the name; address and telephone number of all customers, except public telephones and number unlisted at customer's request.
>
> (2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.
>
> (3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover . . . .

In its declaratory orders in these two proceedings, the TRA interpreted Rule 1220-4-2-.15 to require that the names and logos of competing local exchange telephone companies

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[8] The Administrative History for Rule 1220-4-2-.15 states: "Original rule certified May 9, 1974. Amendment filed August 18, 1982; effective September 17, 1982. Amendment filed November 9, 1984; effective December 9, 1984."

be placed on the covers of the white pages directories that BAPCO publishes for BellSouth, the incumbent local exchange telephone company that is required by law to publish a white pages directory. As we stated in *Jackson Express, Inc. v. Tennessee Public Service Commission*, "Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules. A strict standard of review applies in interpreting an administrative regulation, and the administrative interpretation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" 679 S.W.2d 942, 945 (Tenn. 1984).

We therefore must give "great deference" to the TRA's interpretation of Rule 1220-4-2-.15, and the TRA's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." In addition, we review the agency's interpretation in light of the statutes, discussed above, governing the TRA. Referring again to those statutes, we note that the General Assembly has provided that the laws governing the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] . . . shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction. . . ." Tenn. Code Ann. § 65-4-106. The General Assembly also has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers." Tenn. Code Ann. § 65-2-102(2) (Supp. 2001). Finally, the legislature has stated that "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Tenn. Code Ann. § 65-5-210(a) (Supp. 2001).

As stated, Rule 1220-4-2-.15 requires that the "name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover[.]" We have considered Tenn. Code Ann. §§ 65-2-102(2), 65-4-104, 65-4-106 and the pertinent provisions of Chapter 408. Additionally, we have accorded the TRA's interpretation of its own rules the deference required. In so doing, we fail to find any demonstration that the TRA has acted in excess of its authority in requiring that the names of competing local exchange providers be included on the cover of BellSouth's white pages directories. The declaratory orders as promulgated serve to "resolve . . . contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Accordingly, the declaratory orders are expressly authorized by Tenn. Code Ann. § 65-5-210(a).

III. TRA's Jurisdiction over BAPCO

While it is abundantly clear that the TRA has jurisdiction over BellSouth, a regulated public utility, BAPCO suggests that because it is not a public utility, it is beyond the reach of the TRA.

In its declaratory orders, the TRA required that BAPCO provide AT&T and Nextlink the opportunity "to contract with BAPCO for the appearance of AT&T's [and Nextlink's] name[s] and logo[s] on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract."

While we recognize that this issue could have been avoided had the TRA ordered BellSouth, as distinct from BAPCO, to implement the TRA's interpretation of Rule 1220-4-2-.15, we nevertheless conclude that the TRA did not err in ordering BAPCO to allow competing service providers to contract with BAPCO to be included on the covers of BellSouth's white pages directories. Our conclusion is based upon the particular facts of these related proceedings and

upon legal precedent governing public utilities and their non-utility subsidiaries and affiliates.

Factually, much of the testimony admitted into evidence during the AT&T proceeding pertained to BAPCO's role in publishing directories on behalf of BellSouth. The testimony of a number of witnesses can be summarized by quoting a single sentence of the testimony of one witness employed by BAPCO: "[a]ll editorial, publishing, and business decisions [regarding the directories] are under BAPCO's exclusive control." R., Vol. 16, p. 37 (Testimony of R.F. Barretto, Director-Local Exchange Carrier Interface for BAPCO). Moreover, BellSouth admitted in its answer to AT&T's petition for a declaratory order that "during the course of the negotiations between AT&T and [BellSouth] for an interconnection agreement ... [BellSouth] properly maintained that negotiations with respect to telephone directories were to be conducted with BAPCO." R., Vol. 1, p. 35. Likewise, BAPCO stated in its answer to the AT&T petition that "[t]he issues raised in the AT&T Petition should be resolved between AT&T and BAPCO[.]" R., Vol. I, p. 45.

With regard to precedent, we considered in *Tennessee Public Service Commission v. Nashville Gas Co.*, an analogous issue concerning a parent corporation and its subsidiary in the context of rate-making. 551 S.W.2d 315 (Tenn. 1977). In permitting the TRA's predecessor, the Public Service Commission, to consider pertinent financial data of the parent corporation (not a public utility regulated by the Commission) in setting the rates for the subsidiary corporation (a public utility regulated by the Commission), we stated:

> [A] regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations. The

> filing of consolidated reports by parent and subsidiary corporations, both for tax purposes and regulatory purposes, is so commonplace as to be completely familiar in modern law and practice. Considerations of "piercing the veil," which are involved in cases involving tort, misconduct or fraud, are largely irrelevant in the regulatory and revenue fields. In order for taxing authorities to obtain accurate information as to revenues and expenses, the filing of consolidated tax returns by affiliated corporations is frequently required, and rate-making and regulatory bodies frequently can and do consider entire operating systems of utility companies in determining, from the standpoint both of the regulated carrier and the consuming public fair and reasonable rates of return.

Id. at 319-20. Continuing, we stated that holding otherwise would allow the regulated utility, "through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers." *Id.* at 321.

Although the cases under submission are not rate-making proceedings, we conclude that the reasoning and the principles stated in *Nashville Gas* are applicable thereto. BellSouth is a public utility regulated by the TRA and is required by law to provide a white pages directory in its market areas. BellSouth has contracted that duty to BAPCO, an affiliated company within BellSouth's parent corporation. Thus, for purposes of these two declaratory order proceedings, we conclude that the TRA had jurisdiction over BAPCO. Were we to conclude otherwise, BellSouth could escape the legal responsibilities thrust upon it by Rule 1220-4-2-.15. Because BellSouth delegated its responsibility over the white pages directories to BAPCO, and because BAPCO has exclusive control over the directories, we conclude that

the TRA has jurisdiction over BAPCO for the purposes of these two proceedings.

IV. First Amendment Issue

Next, the TRA contends that the Court of Appeals erred in holding that the TRA's decisions in these two cases amount to "compelled speech" and therefore violate the First Amendment.[9] For the reasons set out below, we hold that the TRA's orders do not violate the First Amendment.

The TRA's orders in these two proceedings implicate two lines of First Amendment cases: those pertaining to "compelled speech" and those pertaining to "commercial speech." The parties focus most heavily upon the former line, so we begin with an analysis of the law regarding compelled speech.

The United States Supreme Court, in its cases involving compelled speech, has held that the First Amendment not only bars the government from prohibiting protected speech, it also may bar the government from compelling the expression of certain views or the subsidization of speech to which an individual objects. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Wooley v. Maynard*, 430 U.S. 705 (1977). Although the Court's compelled speech cases may be divided into numerous categories, the parties rely most heavily on those cases involving laws or regulations requiring individuals to contribute financially to speech with which they disagree. This category of cases is typified by *Abood v. Detroit Board of Education*[10] and *Keller*

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[9] The First Amendment applies to the States through the Fourteenth Amendment. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[10] 431 U.S. 209, 235-36 (1977) (holding that teachers' compulsory union dues could not be used for political or (cont'd)

v. State Bar of California.[11] In that pair of cases, the Court set out a "germaneness" test, under which compelled contributions do not offend First Amendment principles so long as they are used for activities that are germane to the organization's central purpose.

The parties focus upon two separate cases discussing *Abood* and *Keller* in the context of compelled financial contributions to commercial speech.[12] The TRA, in contending that the Court of Appeals erred in reversing its orders on First Amendment grounds, relies on *Glickman v. Wileman Bros. & Elliott, Inc.*[13] Conversely, BAPCO, contending that the First Amendment analysis of the Court of Appeals is correct, relies upon *United States v. United Foods, Inc.* Both *Glickman* and *United Foods* involve federal programs administered by the Secretary of Agriculture, in which the Secretary imposed mandatory assessments on two

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(... cont'd)

ideological purposes that were not "germane" to the union's duties as a collective-bargaining representative).

[11] 496 U.S. 1, 14 (1990) (holding that a state bar's use of compulsory dues to finance political activities with which the petitioners disagreed violated their right to free speech when the expenditures were not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of [legal services]'").

[12] The TRA argues in the alternative that its two orders meet the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980). BAPCO argues in response that the orders do not meet the requirements of *Central Hudson*. The application of *Central Hudson* is discussed later in this opinion.

[13] 521 U.S. 457 (1977).

different agricultural industries for funding generic advertising for the respective industries.

In *Glickman*, growers, handlers, and processors of California tree fruits challenged marketing orders promulgated by the Secretary. The orders imposed mandatory assessments on the petitioners to cover the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches. The petitioners asserted that the government-mandated financial contribution to the generic advertising campaign violated their First Amendment rights. After summarizing the components of the regulatory scheme of which the marketing orders were a part, the Court concluded that "[t]hree characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge freedom of speech protected by the First Amendment." *Id.* 521 U.S. at 469. The Court continued:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. *Second, they do not compel any person to engage in any actual* or *symbolic speech.* Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469-70 (emphasis added). The Court then found that the assessments under the marketing orders did not constitute compelled speech. As the Court stated:

> Our compelled speech case law . . . is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they "would prefer to remain silent," or require them to be publicly identified or associated with another's message.

Id., 521 U.S. at 470-71 (citations omitted). Applying the *Abood-Keller* "germane[ness]" test, the Court concluded that the generic advertising program was "unquestionably germane to the purposes of the marketing orders" and that the assessments were not used to fund ideological activities. *Glickman*, 521 U.S. at 473.

Superficially, *United Foods* appears to be similar to *Glickman*. *United Foods* involved a mandatory assessment imposed by the Secretary of Agriculture on handlers of fresh mushrooms, to be used primarily for funding advertising for the mushroom industry. Despite the facial similarity between the two cases, however, the Court in *United Foods* distinguished *Glickman* on the grounds that the compelled assessments in *Glickman* were part of a broad regulatory scheme, whereas the assessments in *United Foods* were not. Indeed, the *United Foods* Court found that the only program served by the compelled contributions was the very advertising scheme in question. 533 U.S. at 411-12. The Court then applied the *Abood-Keller* principles to the mandatory assessments and ultimately held that they violated the First Amendment.

Having reviewed this authority, however, we cannot conclude that the cases cited by either of the parties are completely apposite to the case under submission. The principles stated in *Abood* and *Keller*, and in the later cases in which *Abood* and *Keller* have been applied (including *Glickman* and *United Foods*), are limited to cases involving compelled *contributions* to speech. The TRA's orders, on the other hand, effectively require BAPCO to engage in *actual speech*. The distinction, we conclude, is significant. *Cf. Glickman*, 521 U.S. at 469 (stating that the marketing orders did not "compel any person to engage in any actual or symbolic speech"); and 521 U.S. at 470-71 (stating that the Court's "compelled speech case law . . . is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require

respondents to repeat an objectionable message out of their own mouths. . . .").

Because the *Abood-Keller* standards applied in *Glickman* and *United Foods* are inapposite, we next must determine what standard to apply to these two cases. Consequently, our analysis takes us to the United States Supreme Court case law involving commercial speech.

Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally protected under the First Amendment, as applied to the States under the Fourteenth Amendment. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). The Supreme Court, however, has distinguished between commercial speech and other types of speech in that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally protected expression." *Central Hudson*, 447 U.S. at 562-63; *see also United Foods*, 533 U.S. at 409.

In *Central Hudson*, the Supreme Court adopted a four-part analysis to be used in determining whether a law impermissibly restricts commercial speech. The Court stated:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The *Central Hudson* test, however, has been a subject of considerable debate. Although the Court has preserved the test in cases involving *restrictions* on commercial speech,[14] it has not applied the test in cases involving *compelled* commercial speech or *compelled financial support of commercial speech*. *See Glickman*, 521 U.S. at 474 (holding that the Court of Appeals erred in relying on *Central Hudson* for the purpose of testing the constitutionality of government-mandated assessments for promotional advertising).[15]

In *Walker v. Board of Professional Responsibility of the Supreme Court of Tennessee*, this Court noted that the distinction between restricted speech cases and compelled speech cases is significant, stating, "The fact that a regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment." 38 S.W.3d 540, 545 (Tenn. 2001). Accordingly, we looked to the more forgiving standard set forth by the United States Supreme Court in *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), as the defining test for First Amendment analysis of compelled speech cases.

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[14] *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999); *see also United Foods*, 533 U.S. at 409-10 (noting criticism of *Central Hudson* test but declining to "enter into the controversy").

[15] The *United Foods* Court noted that the *Central Hudson* test has been criticized, but did not revisit the *Central Hudson* test and did not apply it to the mandatory assessments at issue in that case. The Court simply noted that the mandatory assessments could not be sustained under *any* of the Court's precedents. *Id.* 533 U.S. at 410.

Walker, 38 S.W.3d at 545.[16] As we noted in *Walker*, *Zauderer* states:

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.

Id. at 546 (quoting *Zauderer*, 471 U.S. at 65). In other words, "under current law – as announced in *Zauderer* – as long as the disclosure requirement is reasonably related to the state's interest in preventing deception of consumers, and not unduly burdensome, it should be upheld." *Id.*

Although both the *Zauderer* and *Walker* cases specifically involved application of First Amendment principles to attorney advertising, we noted in *Walker* that attorney advertising is considered commercial speech under the First Amendment. *Id.* at 544. We see no reason why the compelled commercial speech at issue in *Zauderer* and *Walker* should be governed by a different standard than the compelled commercial speech at issue here; accordingly, we now apply the *Zauderer* standard to the case under submission.

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[16] Notably, several federal circuits also have applied the *Zauderer* test to governmental regulations that require disclosure of information. *See, e.g., Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 233 F.3d 981, 994 (7th Cir. 2000); *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94,108 (2d Cir. 2000); *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 54 (1st Cir. 2000).

An application of *Zauderer* to the pending appeals requires that we determine:

1. Whether the TRA's disclosure requirement is reasonably related the state's interest in preventing deception of consumers; and

2. Whether the disclosure requirement is unduly burdensome.

We first address the relationship between the TRA's orders and the state's interest in preventing deception of consumers. This interest in preventing deception presents itself in a different context than is seen in the attorney advertising regulations of *Zauderer* and *Walker*. The rules in *Zauderer* and *Walker* compelled attorneys to disclose additional information about themselves, whereas the TRA's orders compel BellSouth to disclose information about the identity of its competitors. The ultimate object of the regulations, however, is the same: to inform consumers. In other words, BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available.

Richard Guepe, District Manager in the Law & Governmental Affairs organization of AT&T, in his testimony before the TRA, addressed the value of having the names and logos of the competing local exchange telephone companies on the cover of the white pages directory published on behalf of BellSouth:

> The cover of the phone book is a simple, direct, and very important means to communicate to Tennessee consumers. To be effective, consumer communication must be simple, it must be clear, and it must be repeated. That is why the phone book cover is important. Consumers see it often. The cover of the book does tell the consumer what's inside. They read it by its symbols, not by its fine print. We are asking that the cover of the

> phone book tell Tennessee consumers very clearly that they have a choice in the local service market.

R., Vol. 15, p. 64. As explained by Guepe, the TRA's two declaratory orders directly advance competition in the provision of local telephone services by effectively informing consumers as to the existence of alternative local telephone services. Thus, we conclude that the orders are reasonably related to the state's asserted interest.

The second step of the *Zauderer* test is to determine whether the TRA's orders are unduly burdensome. To assist in this determination, the United States Supreme Court has provided guidance. In *Board of Trustees of the State University of New York v. Fox*, the Supreme Court held that governmental restrictions upon commercial speech are not invalid merely because they go beyond the least restrictive means capable of achieving the desired end. *Fox*, 492 U.S. 469, 480 (1989). The Court stated:

> [W]hile we have insisted that "'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful,'" we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480 (citations omitted).

Under *Fox*, the TRA is the proper body to determine "the manner of regulation that may best be employed" to fulfill the government's objective. *Id.* Thus, this Court may not determine whether the manner of regulation chosen by the TRA should have been more or less restrictive. Ours is merely to review the chosen regulation and determine whether it is unduly burdensome.

Reviewing the record thoroughly in light of the principles articulated in *Fox*, we are firmly convinced that the TRA's decisions requiring the logos and names of competing service providers to be displayed on the directory covers do not impose an inordinate burden on BellSouth. As discussed *supra*, the governmental interest in this case is important, indeed, for informing consumers about their choices in the local telecommunications service market is a fundamental aspect of promoting free competition. Moreover, the government's chosen means to advance its goals, the requirement that logos of competing telecommunications service providers be displayed on equal footing with BellSouth's logo, does not substantially affect BellSouth's ability to communicate its own speech to customers in the market. Given the significant weight of the governmental interest and the relatively narrow impact of the orders in this case, we conclude that the TRA's orders are not unduly burdensome.

Concluding the *Zauderer* analysis, we find that the TRA's orders are reasonably related to the state's substantial interest in preventing the deception of consumers, and we further find that the orders under review directly advance the state's interest without imposing an excessive burden. Thus, we hold that the TRA's orders survive *Zauderer* scrutiny and consequently are valid under the First Amendment.

V. BAPCO's Additional Arguments

BAPCO raises two other arguments in its brief; however, neither was considered and decided as an issue by the TRA or by the Court of Appeals. We find that both arguments are without merit.

In its first argument, BAPCO contends that the TRA's orders amount to a confiscatory taking in violation of the state and federal constitutions. BAPCO's claim is based upon a factual premise that the TRA's orders require BAPCO to display AT&T's name and logo (and those of other competing providers) without compensation. BAPCO's factual premise simply is incorrect. The TRA ordered BAPCO to permit AT&T and, as a result of the Nextlink proceeding, all other competing local exchange telephone companies to contract with BAPCO for the display of their names and logos on the covers of the white pages directories "under the same terms and conditions as BAPCO provides to BellSouth by contract." It is true that the evidence shows BellSouth was not paying BAPCO at the time of the hearing for displaying the BellSouth logo on the directory covers, but nothing in the TRA's orders precludes BAPCO from charging BellSouth for displaying BellSouth's name and logos on the directory covers. The TRA's orders merely require BAPCO to contract with the competing providers "under the same terms and conditions as BAPCO provides to BellSouth by contract." BAPCO therefore has a choice – it may charge BellSouth for displaying BellSouth's name and logo, in which case BAPCO also may charge the competing companies, or it may choose not to charge BellSouth, in which case it may not charge the other companies. For this reason, BAPCO's confiscatory-taking argument is without merit.

BAPCO's second argument is that the TRA's orders violate BAPCO's trademark rights. This argument is based upon the erroneous premise that the "**BELL**SOUTH" trademark displayed on the directory covers is intended to

represent BAPCO, not BellSouth. Throughout the administrative proceedings, BAPCO claimed that the "**BELL**SOUTH" trademark on the covers indicates that the directories are published by BAPCO and that the trademark only coincidentally represents BellSouth. The TRA rejected BAPCO's factual argument on this point and found that the "**BELL**SOUTH" trademark on the directories referred to BellSouth, the incumbent local exchange telephone company. The record fully supports the TRA's factual finding on this point. Moreover, we note that BAPCO has failed to cite any authority that would support striking down a regulatory agency's actions over a regulated utility on trademark-infringement grounds. For these reasons, we find that BAPCO's trademark issue is without merit.

VI. Conclusion

Accordingly, we hold that the TRA's two declaratory orders are not in excess of the statutory authority of the agency and that the TRA had jurisdiction over BAPCO for the purposes of these proceedings. In addition, we hold that the orders do not violate the First Amendment. Therefore, we reverse the judgment of the Court of Appeals in these two cases and reinstate the judgments of the Tennessee Regulatory Authority.

The costs are taxed to BellSouth Advertising & Publishing Corporation, for which execution may issue if necessary.

/s/
ADOLPHO A. BIRCH, JR.,
JUSTICE

IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

May 3, 1999 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY, ET AL.

Appeal from the Tennessee Regulatory Authority at Nashville, Tennessee Nos. 96-01692 & 98-00654

No. M1998-00987-COA-R12-CV & M1998-01012-COA-R12-CV Filed February 16, 2001

In these cases consolidated on appeal, BellSouth Advertising & Publishing Corporation (BAPCO) appeals from the action of the Tennessee Regulatory Authority requiring it to brand the covers of its "White Pages Directory" with the names and commercial logos of local telecommunication companies in competition with its parent corporation BellSouth Telecommunications, Inc. (BST). We reverse the judgment of the Tennessee Regulatory Authority. Judge Cottrell dissents.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Tennessee Regulatory Authority Reversed

WILLIAM B. CAIN, J., delivered the opinion of the court. WILLIAM C. KOCH, JR., J., filed a concurring opinion with Judge Cain specifically concurring in Part VI thereof. PATRICIA J. COTTRELL, J., filed a dissenting opinion.

Paul S. Davidson and Guilford F. Thornton, Jr., Nashville, Tennessee, and James F. Bogan, III and Daniel J. Thompson, Jr., Atlanta, Georgia, for the appellant, BellSouth Advertising & Publishing Corporation.

Henry Walker and K. David Waddell, Nashville, Tennessee, for the appellees, Nextlink Tennessee, L.L.C. and Tennessee Regulatory Authority.

OPINION

This case represents the consolidation of two different, but intricately linked, administrative appeals concerning BellSouth Advertising & Publishing Corporation (BAPCO). The first, *BellSouth Advertising and Publishing Corp. v. Tennessee Regulatory Authority, et al.* (the AT&T case hereinafter) concerned a claim originally brought by American Telephone & Telegraph, Inc. (AT&T) seeking to have its name and logo placed on the covers of the "White Pages" directories published by BAPCO. By order entered March 19, 1998, the Tennessee Regulatory Authority (TRA) required BAPCO to place AT&T's name and logo on the cover of its "White Pages."

The aforementioned AT&T declaratory order was interpreted and applied in a proceeding wherein NEXTLINK L.L.C., and similarly situated telecommunications companies sought to "brand" BAPCO's "White Pages" cover along with AT&T. Because of the substantial similarity of the issues, these two cases were consolidated for consideration in this court. While certain issues raised in the Nextlink case are of no consequence in the AT&T case, and thus must be considered separately, the crucial issues are common to both cases.

This crucial, sub-constitutional issue presents the question of whether or not the TRA, under Tennessee law and Tennessee Regulatory Authority Rule 1220-4-2-.15, can compel BellSouth Advertising and Publishing Corporation to display, on the cover of its "White Pages" telephone directory, the name and commercial logo of local telecommunication companies that are competitors of BellSouth Telecommunications, Inc., giving such competing

names and commercial logos equal prominence with the "BellSouth" name and logo.

I. HISTORICAL BACKGROUND

In the decade of the 1990's, many states, including Tennessee, were running legislatively parallel to the Congress of the United States in converting, from a monopoly environment to a competitive environment, the providing of local telephone services.

On January 25, 1999, the United States Supreme Court issued its decision in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). This decision was a detailed construction of the Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.* Justice Thomas, concurring in part and dissenting in part, traced the history of telecommunications in the United States and the effect of the Telecommunications Act of 1996.

> From the time that the commercial offering of telephone service began in 1877 until the expiration of key patents in 1893 and 1894, Alexander Graham Bell's telephone company — which came to be known as the American Telephone and Telegraph Company — enjoyed a monopoly. In the decades that followed, thousands of independent phone companies emerged to fill in the gaps left by the telephone giant and, in most larger markets, to build rival networks in direct competition with it. As competition developed, many municipalities began to adopt ordinances regulating telephone service.
>
> During the 1900's, state legislatures came under increasing pressure to centralize the regulation of telephone service. Although the quasi-competitive system had significant drawbacks from the consumers' standpoint — principally the refusal of competing systems to interconnect — perhaps the strongest advocate of state regulation was AT&T itself. The company's arguments that telephone service was naturally monopolistic and that competition was resulting in

wasteful duplication of facilities appealed to Progressive-era legislatures. By 1915, most States had established public utility commissions and charged them with regulating telephone service. Over time, the Bell Companies' policy of buying out independent providers coupled with the state commissions' practice of prohibiting competitive entry led back to the monopoly provision of local telephone service.

. . . .

In the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S. C. § *151 et seq.*, Congress transferred authority over interstate communications from the ICC to the newly created Federal Communications Commission (FCC or Commission). As in the Mann-Elkins Act, Congress chose not to displace the States' authority over intrastate communications. . . .

Congress enacted the Telecommunications Act of 1996 (Act), Pub. L. 104-104, 110 Stat. 56, against this backdrop. To be sure, the 1996 Act marked a significant change in federal telecommunications policy. Most important Congress ended the States' longstanding practice of granting and maintaining local exchange monopolies. It also required incumbent local exchange carriers to allow their competitors to access their facilities in three different ways. . . . [I]ncumbents must: interconnect their networks with requesting carriers' facilities and equipment, provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, and offer to resell at wholesale rates any telecommunications service that they provide to subscribers who are not telecommunications carriers. The Act sets forth additional obligations applicable to all telecommunications carriers and all local exchange carriers. To facilitate rapid transition from monopoly to competitive provision of local telephone service,

> Congress set forth a process to ensure that the incumbent and competing carriers fulfill these obligations.
>
> Section 252 sets up a preference for negotiated interconnection agreements. To the extent that the incumbent and competing carriers cannot agree, the Act gives the state commissions primary responsibility for mediating and arbitrating agreements. Specifically, Congress directed the state commissions to mediate disputes between carriers during the voluntary negotiation period and — after the negotiations have run their course — to arbitrate any "open issues." In conducting these arbitrations, state commissions are directed to ensure that open issues are resolved in accordance with the requirements of §251, "establish . . . rates for interconnection, services, or network elements" according to the standards that Congress set forth in §252(d), and to provide a schedule for implementing the agreement reached during arbitration.[17]

AT&T Corp., 525 U.S. at 402-06. (Thomas, J., concurring in part and dissenting in part).

While both cases at bar are based on Tennessee law, it is well to note that this dispute first came before the TRA in 1996 when American Telephone and Telegraph Company filed a petition for arbitration against BellSouth Telecommunications, Inc. (BST), the incumbent local exchange carrier, under section 252 of the Federal Telecommunications Act of 1996. In this action, AT&T asserted that the TRA should resolve, under the federal act, the question of whether AT&T had the right to have its commercial logo displayed on the cover of directories published by BAPCO for BST. Following the lead of

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[17] As this extensive quotation is for historical background, many citations of supporting authority in the opinion have been omitted.

Georgia (Georgia PSC Docket No. 6801-U Sept. 26, 1996), Massachusetts (Order of Massachusetts DPU in NYTEX/AT&T/MCI/Sprint Arbitration Dec. 4,1996), and North Carolina (Order of North Carolina Utilities Commission in AT&T/BST Arbitration Dec. 23, 1996), the TRA held that the directory cover issue was not arbitrable under the federal act and stated that "private negotiations are the preferred method of resolving this issue, and the parties are encouraged to resolve this matter through negotiation." Private negotiations, however, reached an impasse because AT&T would not agree to cease the display of its commercial logo on the covers of directories published by competitors of BAPCO.

II. CHRONOLOGY OF THE TENNESSEE LITIGATION

BAPCO is a wholly owned subsidiary of BellSouth Enterprises, Incorporated, which is itself a wholly owned subsidiary of BellSouth Corporation. BST is the "incumbent local exchange telephone company" as defined in our state act, Tennessee Code Annotated section 65-4-101(d) (1999) and is also a wholly owned subsidiary of BellSouth Corporation.

AT&T and interveners Nextlink Tennessee, L.L.C. (Nextlink), M.C.I. Telecommunications Corporation (MCI), and American Communications Services, Inc. (ACSI) are "competing telecommunications service providers" within the meaning of Tennessee Code Annotated section 65-4-101(e).

Both federal law [47 U.S.C. §271(c)(2)(B)(viii)] and Tennessee law [Tenn. Code Ann. § 65-4-124(c)] require BST to publish a directory of "White Pages," containing not only the names of its own subscribers but also the names of subscribers of competing carriers. It is undisputed that the "White Pages" of BellSouth are published in full compliance with both federal and state law. The "White Pages" directories required of BellSouth Telecommunications

Company are, in fact, published by BAPCO under contract with BST. The issues in this case involve only the covers of BellSouth "White Pages" directories.

The Tennessee legislative parallel to the Telecommunications Act of 1996 actually predates the federal act. Chapter 408 of the Public Acts of 1995 became effective on June 6, 1995. This Tennessee act amended several sections of Title 65 of the Tennessee Code and established certain new sections relative to the regulation of telecommunications carriers in Tennessee. *See* Tenn. Code Ann. §§ 65-5-208 to -213 (1999).

Following the refusal of the TRA to arbitrate the "cover" issue under the federal act and the failure of negotiations between the parties, AT&T filed its petition for a declaratory ruling on December 16, 1996. This proceeding sought a decision from the TRA as to whether Tennessee Code Annotated sections 65-4-104, 65-4-114(l), 65-4-117(3) and 65-4-122(c), along with TRA Rule 1220-4-2-.15 apply to the covers of "White Pages" telephone directories, published and distributed on behalf of BST by BAPCO and containing the names and telephone numbers of customers of AT&T. In its petition, AT&T requested the TRA to convene a contested case under Tennessee law with BAPCO and BST as parties respondent. AT&T sought a decision from TRA regarding whether this statutory and rule authority required BAPCO to place AT&T's name and logo on the covers of such directories. Thereafter, TRA convened a contested case pursuant to Tennessee Code Annotated section 4-5-223 and Tennessee Code Annotated section 65-2-104.

In its petition, AT&T asserted:

> [T]he TRA [should] issue a declaratory order declaring that telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as BST; and that the covers of directories, published and distributed by BAPCO on behalf of BST

> which include the names and numbers of customers of AT&T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT&T in like manner to the name and logo of BST, or include no company's name and logo, including the name "BellSouth."

In Re: Petition of AT&T for Declaratory Order, Petition of AT&T to the Tenn. Regulatory Auth., No. 96-01692 (filed Dec. 16, 1996).

By order dated February 20, 1997, TRA granted the request of AT&T to convene a contested case proceeding with BST and BAPCO as party respondents. In the process, the TRA also granted intervention to MCI, ACSI and Nextlink so that each party would have an opportunity to participate in the proceeding. On July 17, 1997, the hearing was held before the TRA. On September 23, 1997, the TRA publicly deliberated and announced its decision. On March 19, 1998, the TRA issued its order holding that TPSC Rule 1220-4-2-.15 required the appearance of the name and logo of AT&T on the cover of the "White Pages" directory published by BAPCO under the same terms and conditions as were provided to BST by contract. On May 15, 1998, BAPCO filed its Petition for Review in this court.

III. THE DECISION OF TRA

TRA Rule 1220-4-2-.15 provides in its entirety as follows:

> (1) Telephone directories shall be regularly published, listing the name[,] address, and telephone number of all customers, except public telephones and number unlisted at customer's request.
>
> (2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.

(3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover. Information pertaining to emergency calls such as for the police and fire departments shall appear conspicuously in the front part of the directory pages.

(4) The directory shall contain such instructions concerning placing local and long distance calls, calls to repair and information services, and location of telephone company business offices as may be appropriate to the area served by the directory.

(5) Information operators shall have access to records which include all listed telephone numbers (except telephone numbers not listed or published at customer request) in the area for which they are responsible for furnishing information service.

(6) In the event of an error in the listed number of any customer, the telephone utility shall intercept all calls to the listed number for a reasonable period of time provided existing central office equipment will permit and the number is not in service. In the event of an error or omission in the name listing of a customer, such customer's correct name and telephone number shall be in the files of the information or intercept operators and the correct number furnished the calling party either upon request or interception.

(7) Whenever any customer's telephone number is changed after a directory is published, the utility shall intercept all calls to the former number for a reasonable period of time, and give the calling party the new number provided existing central office equipment will permit, and the customer so desires. Provided, however, the telephone utility may refuse to take such action for good and sufficient reason.

(8) When additions or changes in plant, records or operations which will necessitate a large group of number changes are scheduled, reasonable notice shall be given to all customers so affected even though the additions or changes may be coincident with a directory issue.

(9) The inside cover of the directory [will] contain the Commission's telephone number: 1-800-342-8359 (toll free).

This rule, adopted in 1968, long before federal and state statutory policy changes mandating the conversion from a monopolistic environment to a competitive environment in the provision of local telephone services, provides only that the cover of the "White Pages" directory should disclose the name of the telephone utility, the area included in the directory, and the month and year of issue of the directory. In the monopoly environment of 1968, there was only one telephone utility; that utility was the only local service provider, and thus, it was the only telephone utility locally serving the customers listed in the directory.

The policy of the Tennessee Telecommunications Act of 1995 is stated as follows:

> The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential

> customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. § 65-4-123 (Supp. 1999).

The majority of the TRA held that the policy declarations in Tennessee Code Annotated section 65-4-123, together with proper construction of Rule 1220-4-2-.15, provide sufficient authority to compel BST through BAPCO to display, on the cover of its "White Pages" directory, the name and commercial logo of AT&T in equal prominence with the BellSouth name and commercial logo and on the same terms and conditions as are given by BAPCO to BST. The dissenting member of the TRA agreed that the end result was correct but felt that it should not be attained in a contested case construing the Rule but rather that a rule-making proceeding was needed to revise the Rule so as to apply in a competitive environment. This issue is so clearly drawn and articulated in the majority and dissenting opinions of the TRA that extensive quotation from the declaratory order is desirable in order to focus appellate consideration.

Chairman Greer, speaking for himself and Director Kyle, stated the majority position of the TRA in the declaratory order of March 19, 1998 as follows:

> Following the disposition of the pending motions, each Director openly deliberated in great detail on the merits of the case and stated his or her position as to the proper disposition of the issues. After the deliberations were concluded, the motion as stated by Chairman Greer prevailed. The motion and supporting comments are as follows:
>
> > As a regulator in Tennessee, I am bound by the parameters of federal law, state law and existing rules of this Agency. However, I am also charged with the duty of promoting telecommunications competition in this state according to the [state and federal] Telecommunications Act[s] of 1995 and 1996, and

with the duties of protecting the interest of both the consumers of Tennessee and the utility providers. Sometimes the fulfillment of all of these duties conflicts, not only with each other but with the applicable laws involved. I feel that the production of one complete phone book containing the names and numbers of all customers, promotes competition, reduces consumer confusion and best serves the needs of Tennessee. I feel this solution of one complete directory fulfills my policy goals and I would encourage this action to be taken by the parties involved.

All of that said, however, I must now determine what I am allowed to do under the law. The original petition brought four (4) statutes and one (1) Tennessee Public Service Commission/TRA rule in question. And I will explore each of these.

First, [Tenn. Code Ann. §] 65-4-104 deals with the TRA's jurisdiction over public utilities. The TRA obviously has jurisdiction over BellSouth Telecommunications and the fulfillment of their obligations as a utility. By virtue of contract, then, BAPCO, as BellSouth's agent, becomes responsible for the fulfillment of BellSouth's utility obligations under the law. . . .

[Tenn. Code Ann. §] 65-4-114(l) empowers the Authority to require every public utility to provide safe, adequate and proper service, but it does not require that utility to provide such service to customers other than its own. This statute, then, in my opinion, is not really applicable to this case.

[Tenn. Code Ann. §] 65-4-117(3) enables the Authority, after hearing, by order in writing, to fix just and reasonable standards to be applied to any utility. This statute seems to be envisioning rules,

which truly requires a rule-making proceeding. Thus, this statute is not applicable, in my opinion, to this case.

[Tenn. Code Ann. §] 65-4-122(c) mandates that a public utility shall not make or give any undue preference to anyone. However, this statute applies more to the ratepayers than to the utilities, as evidenced in *New River Lumber Company versus Tennessee Railway*, 1921, thus, this statute is not relevant to this case either.

Now, Tennessee Public Service Commission Rule [TRA Rule] 1220-4-2-.15 mandates that a telephone directory be published regularly containing the names and numbers of all customers and distributed to all customers served by that directory. The directory must have the name of the utility, the area served, and the month and year of issue on the cover. . . .

I have been charged with the interpretation of this rule in resolving this issue. I feel that it is important to note that this rule was created in 1968, long before the 1996 Telecommunications Act and the push for competition. Keeping this in mind, and realizing that no more than one utility existed at the time of this statute to address, I believe that the plain language of the rule envisions the name and utility whose customers are inside the directory. Following the same logic, then, I believe that if more than one utility's customers are inside the same directory, then more than one utility's name would be on the cover. I do not believe I have the authority to allow a telephone book with no name on the cover.

The charges of law in this docket bring another important statute into focus, and that is [Tenn. Code Ann. §] 65-4-123. This statute discusses not only the policy of this state to permit competition in all

telecom services markets, but also that this regulation shall protect the interest of the consumers. **This Agency has ruled that directory assistance is not a basic service for Tennessee consumers, therefore, in my opinion, the white pages listing is a basic service and an essential tool the customer needs to efficiently and fairly use the network.** This telephone directory, then, needs to be complete and as easy to understand as possible. In my opinion, the names of local providers on the cover would be helpful to consumers. This would not only serve as information, but would also promote competition by showing consumers they have a choice in service providers. This method also allows small companies to continue to provide service without the financial burden of having to produce their own directory. They may contract with another carrier or publisher to satisfy their TRA Rule requirements and still have their name on the cover of the directory.

Therefore, after reading all of the testimony and briefs filed in this docket, and after a hearing on the merits, and after contemplation of both my duties as a regulator and my interpretation of the applicable rules and the statutes, I feel that the name or names of the utility or utilities, whose customers are inside the directory, by contract, should be allowed to be included in the cover in the same format. So, if a carrier contracts with another carrier or publisher to have their customers included in combined directory, then the included carrier should have its name on the directory cover in a like format. **Thus, I move that AT&T be allowed to contract with BAPCO to have its name on the cover of the directory under the same terms and conditions as that of BellSouth's name. And further, BAPCO and/or BellSouth must offer the same terms and**

> **conditions to AT&T in a just and reasonable manner.**

In Re: Petition of AT&T Communications, Declaratory Order, Tenn. Regulatory Auth., No. 96-01692 (March 19, 1998) (citations and footnotes omitted)(emphasis in original).

Thus, does the majority of the TRA hold in clear and unambiguous language that the policy of Tennessee Code Annotated section 65-4-123 and Rule 1220-4-2-.15, in its present form, authorize the action sought by AT&T in a "contested case" proceeding for a declaratory order.

With equal clarity, Director Melvin Malone asserts that the result reached by the majority is correct but should be accomplished in a "rule-making" procedure rather than a "contested case" proceeding for a declaratory order.

Says Director Malone:

> In this declaratory order action, AT&T has requested that the Authority issue a declaratory ruling on whether T.C.A. §§ 65-4-104, 65-4-114(l), 65-4-117(3), 65-4-122(c), or TRA Rule 1220-4-2-.15 require BellSouth to place AT&T's name and logo on the front cover of the local directory that is published by BellSouth Advertising and Publishing Company ("BAPCO") on behalf of BellSouth.
>
> Consistent with the majority, in my opinion, this case turns upon the application of the Rule, as opposed to other state statutes relied upon by AT&T in this cause. The plain language of TRA Rule 1220-4-2-.15 mandates that "the name of the telephone utility" must appear on the front cover of the local phone directory. The controlling question here is whether the Rule requires BellSouth to place AT&T's name and logo on the cover of BellSouth's local phone directory, or the local phone directory published on its behalf, when AT&T's customers are listed in said directory.

Unlike the majority, however, I have concluded that applying the plain language of the Rule, irrespective of its original intent and purpose, in the current environment would result in each local telecommunications services provider distributing or providing, directly or indirectly, its own phone book with its name on the front cover to its customers. No law was submitted nor phalanx of language offered in this case that resulted in a metamorphic effect on the plain meaning or intent of the Rule into anything other than what it is. Nonetheless, I am persuaded that the imposition of such a daunting requirement as would be mandated by the plain language of the Rule and its original intent at this stage in Tennessee's transition to a competitive environment may result in crippling consequences to the development of competition.

For the foregoing and other reasons, I have concluded that the most appropriate path in this case is to declare that neither the Rule nor §§ 65-4-114(i), 65-4-117(3), or 65-4-122(c) require BellSouth to place AT&T's name and logo on the front cover of the local directory published by BAPCO on behalf of BellSouth when AT&T's customers are listed therein. Being ever mindful of the clear and unambiguous policy of the State of Tennessee to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets and this agency's general supervisory and regulatory power, jurisdiction, and control under § 65-4-104, I am persuaded that the most judicious manner in which to proceed is with a rulemaking to revise TRA Rule 1220-4-2-.15 and/or to develop a rule to apply in a competitive environment.

In Re: Petition of AT&T Communications, Separate Opinion of Director Melvin Malone, Tenn. Regulatory Auth., No. 69-01692 (March 19, 1998) (footnotes omitted).

While Director Malone asserted that a rule-making procedure was the preferable way to dispose of the case, he chose in the end to join with the majority in result, observing "Hence, while I conclude that the path that I would choose to resolve this matter is more appropriate than that chosen by the majority, the result is the same — all competitors names on the front cover of BellSouth's local phone Directory." *Id.*

IV. JURISDICTION OF TENNESSEE REGULATORY AUTHORITY

The question in this case is not the method used by TRA in hearing and deciding this case, but rather whether or not TRA had jurisdiction to compel BAPCO against its wishes to display the name and commercial logo of AT&T on the cover of its "White Pages" directory. We conclude that neither federal nor state law provides the authority with such jurisdiction.

As stated *supra,* before this contested case was ever filed, AT&T had filed a petition for arbitration against Bellsouth Telecommunications, Inc. under section 252 of the Federal Telecommunications Act of 1996. The TRA held that the issue of whether or not AT&T was entitled to have its commercial logo displayed on the cover of directories published by BAPCO for BellSouth Telecommunications Company was not a subject for arbitration under section 252 of the Federal Act. Administrative agencies in Alabama, Florida, Georgia,, Kentucky, Illinois, Louisiana, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas and Vermont have reached the same conclusion. Administrative agencies in Arizona, Iowa, Kentucky, Montana, and Washington have concluded otherwise.

Inherent in the findings of the majority of state regulatory agencies considering the issue (including Tennessee in this case), is a finding that the cover of the incumbent's "White Pages" directory is not a "network element" within the meaning of 47 U.S.C. § 153 (29) which provides:

> The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29)( ).

BellSouth's obligation under the federal act is to provide "White Pages directory listings for customers of the other carrier's telephone exchange service." 47 U.S.C. § 271(c)(2)(B)(viii)( ).

The TRA rightly acknowledges that the goal in all of the legislative law in these cases is to "unbundle" the network elements of an incumbent local exchange carrier in order to foster nondiscriminatory entry into the competitive market of telecommunications services. With very little by the way of explanation, the TRA held that the branding of "White Pages" directory covers was in the nature of a network or utility function. This holding, if correct, brings the issue of directory cover branding within the ambit of the Telecommunications Act of 1996, the FCC rules regarding enforcement of the act's provisions, and Tennessee's Telecommunications Act of 1995.

The term "network element" is broadly defined to include more than simply the physical facilities and equipment of an ILEC. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). Providing directory listings necessary to local customer service is in the nature of a "network element" to

be provided at cost-based rate. *See AT&T of Va. v. Bell-Atlantic Va., Inc.*, 197 F.3d 663, 674 (4th Cir. 1999). Yet inherent in the TRA's ruling was the finding that the *branding* of the cover of a local white pages directory is an element of BST's network as well, and thus, must be provided to competing LEC's on an unbundled basis.

In this discussion the following is persuasive:

> There is a point, though, at which a particular service is too remote to justify inclusion as a network element. . . . Some things the CLEC's must do for themselves. The unbundling requirement is aimed at making available to CLEC's, those network features, which a CLEC needs to provide competitive local telephone service, . . . or which competitors could not otherwise duplicate in a timely manner or at a reasonable cost. The unbundling requirement ordinarily should not extend to general business services that can be replicated by competitors.

MCI Telecomm. Corp. v. GTE Northwest, Inc., 41 F.Supp.2d 1157, 1180-81 (D.Or. 1999).

The incumbent's "White Pages" directory *cover* is among "items that do not (as they must) meet the statutory definition of 'network element.'" *AT&T Corp.*, 525 U.S. at 386.

So ends the federal inquiry in this case. We now turn to Tennessee law, primarily the Telecommunications Act of 1995 codified as part of Tennessee Code Annotated Title 65, chapters 4 and 5. First, it is well to observe that the Federal Telecommunications Act of 1996 is not preemptive of state legislation, but rather compatible therewith, and state law is preempted only to the extent that it conflicts with the federal act. *See BellSouth Telecomm. v. Greer*, 972 S.W.2d 663, 671 (Tenn. Ct. App. 1997).

This Court has held:

> The Commission, like any other administrative agency, must conform its actions to its enabling legislation.

> *Tennessee Pub. Serv. Comm'n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn. 1977); *Pharr v. Nashville, C. & St. L. Ry.*, 186 Tenn. 154, 161, 208 S.W.2d 1013, 1016 (1948). It has no authority or power except that found in the statutes. *Tennessee-Carolina Transp., Inc. v. Pentecost,* 206 Tenn. 551, 556, 334 S.W.2d 950, 953 (1960). While its statutes are remedial and should be interpreted liberally, *see* Tenn. Code Ann. § 65-4-106 (Supp. 1996), they should not be construed so broadly as to permit the Commission to exercise authority not specifically granted by law. *Pharr v. Nashville, C. & St. L. Ry.*, 186 Tenn. at 161, 208 S.W.2d at 1016.

BellSouth Telecomm., 972 S.W.2d at 680 (Tenn. Ct. App. 1997.)

The Supreme Court of Tennessee has held:

> Any authority exercised by the Public Service Commission must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power. *Pharr v. Nashville, Chattanooga and St. Louis Railway,* 186 Tenn. 154, 208 S.W.2d 1013 (1948); *Nashville, Chattanooga and St. Louis Railway v. Railroad and Public Utilities Commission et al,* 159 Tenn. 43, 15 S.W.2d 751 (1929). In either circumstance, the grant of power to the Commission is strictly construed.

Tennessee Pub. Serv. Comm'n v. Southern Ry. Co., 554 S.W.2d 612, 613 (Tenn. 1977).

As with the question of arbitration under the federal statute we are dealing in this case with a very limited issue. We are concerned not with the "White Pages" listings of competing local telecommunications service providers, which BST, as the incumbent local exchange telephone company, is required by both federal and state law to provide, but rather with the branding of the *cover* of such "White Pages" directory.

Tennessee Code Annotated section 65-4-124 provides in pertinent part as follows:

> (a) All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.
>
> (b) Prior to January 1, 1996, the commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers.
>
> (c) These rules shall also ensure that all telecommunications services providers who provide basic local exchange telephone service or its equivalent provide each customer a basic White Pages directory listing, provide access to 911 emergency services, provide free blocking service for 900/976 type services, provide access to telecommunications relay services, provide Lifeline and Link-Up Tennessee services to qualifying citizens of the state and provide educational discounts existing on June 6, 1995.

Tenn. Code Ann, § 65-4-125(a-c) (Supp. 1999).

The same reasons that impelled the TRA, and a majority of other state regulatory commissions, to reject arbitration of the branding of "White Pages" directory covers under the federal act impel the conclusion that branding of "White Pages" directory covers is not an essential public service,

subject to regulation by the TRA. *National Merchandising Corp. v. Public Serv. Comm'n,* 5 N.Y.2d 485, 490, 158 N.E.2d 714, 716, 186 N.Y.2d 47, 50 (1959). The TRA is mandated by Code section 65-4-124(c) to, by rule, insure that each "customer" of all telecommunications service providers who provide basic local exchange telephone service get a "White Pages" directory listing, and it is undisputed in this record that BellSouth and BAPCO have complied — rule or no rule — with this statutory mandate, which is the same mandate required by federal law.

The TRA held that under section 65-4-104 of the Code, it had jurisdiction over BST and the fulfillment of its obligation as a utility. It further held: "By virtue of contract, then, BAPCO, as BellSouth's agent becomes responsible for the fulfillment of BellSouth's utility obligations under the law." While it is correct to say that BST may not avoid the fulfillment of its statutorily mandated utility functions by either agency or contract, *see Smith v. Southern Bell Tele. and Tel. Co.*, 51 Tenn. App. 146, 151, 364 S.W.2d 952, 955 (1962); *Loring v. BellSouth Adver. & Publ'g. Corp.,* 339 S.E.2d 372, 374 (Ga. Ct. App. 1985), it does not follow that TRA has jurisdiction to regulate the activities of BAPCO in non-utility endeavors.

At this point, the separate identity of BST and BAPCO becomes critical. Both are wholly owned subsidiaries of BellSouth Corporation. BST is a "telecommunications services provider" under Title 65, Chapters 4-5 of Tennessee Code Annotated and thus subject to regulation by the TRA. BST is also an "incumbent local exchange" company under the Federal Telecommunications Act of 1996. On the other hand, BAPCO is not a public utility company, subject to regulation by Tennessee Regulatory Authority, but rather a corporation engaged in the competitive business of publishing telephone directories. Having fulfilled the utility obligations of BST by providing "each customer a basic White Page directory listing" [Tenn. Code Ann. § 65-4-

124(c)], BAPCO has fulfilled all utility functions mandated by Tennessee statute and TRA has no further power under either state law or federal law to regulate the non-utility activities of BAPCO. *See U. S. West Communications, Inc. v. Minnesota Pub. Utils.*, 55 F.Supp.2d 968, 983-985 (D. Minn. 1999).

Tennessee Regulatory Authority correctly held that sections 65-4-114(a), 65-4-117(3) and 654-122(c) of the Code, statutes relied on by AT&T in its petition for a declaratory ruling, were inapplicable to this case. The authority based its decision on the general policy statement of Tennessee Code Annotated section 65-4-123, the jurisdictional provisions of the Code section 65-4-104 and the provisions of TRA Rule 1220-4-2-.15. The rule is brought unchanged into a statutorily mandated competitive environment. As observed by Director Malone:

> [A]pplying the plain language of the Rule, irrespective of its original intent and purpose, in the current environment would result in each local telecommunications services provide. distributing or providing, directly or indirectly, its own phone book with its name on the front cover to its customers. No law was submitted nor phalanx of language offered in this case that resulted in a metamorphic effect on the plain meaning or intent of the Rule into anything other than what it is.

Opinion Director Malone, Tenn. Regulatory Auth., *In Re: Petition of AT&T.*

It is well to add that this observation comports precisely with Tennessee Code Annotated § 65-4-124, which applies by its terms not to just an "incumbent local exchange telephone company" but rather to "all telecommunications services providers" who provide basic local exchange telephone service.

However laudable the desire of the Tennessee Regulatory Authority to have produced "one complete phone book

containing the names and numbers of all customers," the language of the controlling statutes and of TRA Rule 1220-4-2-.15 simply cannot be stretched to provide TRA with authority to compel a non-utility publishing company to brand the cover of its White Pages directory, not just with the name, but also the commercial logo of a telephone utility in competition with BST.

We hold that TRA is without authority under present statutes and rules to compel BAPCO to brand its "White Pages" directory cover with the name and commercial logo of AT&T or any other telecommunications service provider who provides basic, local exchange telephone service.

V. CONSTITUTIONAL QUESTIONS

BAPCO on appeal asserts that the action of TRA in compelling BAPCO to brand the cover of its White Pages directory with the name and commercial logo of AT&T constitutes "forced speech" in violation of the First Amendment of the Constitution of United States. *Miami Herald Publ'g. Co. v. Tornillo,* 418 U.S. 241, 257 (1974). BAPCO further asserts that the TRA order effects a confiscatory taking of property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of Article I section 8 of the Constitution of Tennessee.

Since the majority of this Court is in agreement that the TRA order underlying this appeal is invalid on grounds other than those constitutional issues presented, I would prefer to pretermit the constitutional issues under *Teague v. Campbell Count* 920 S.W.2d 219 (Tenn. Ct. App. 1995) and *Watts v. Memphis Transit Management Co.,* 224 Tenn. 721, 462 S.W.2d 495 (Tenn. 1971). Judge Koch, however, prefers to address the First Amendment "forced speech" question, and since on the merits of this constitutional question I agree with him, I concur in section VI of his separate concurring opinion

entitled "Constitutional Limits on the TRA's Authority to Compel Speech."

VI. TRADEMARK ISSUES

BAPCO asserts that the TRA order violates state and federal trademark law and promotes marketplace confusion.

We have held that TRA has no jurisdiction over BAPCO in its non-utility functions. The only utility function performed by BAPCO in this case was under its contract with BST whereby it undertook to perform for BST the utility duties mandated by federal and state law. It is undisputed that BAPCO has performed these utility duties for BST. We have further held that the branding of the "White Pages" directory cover produced by BAPCO is a non-utility function. These rulings have disposed of all issues necessary to the determination of this case. We therefore pretermit the trademark issues. *See General Outdoor Adver. Co. v. Coley,* 23 Tenn. App. 292, 131 S.W.2d 305 (1938); *Deaton v. Evans,* 192 Tenn. 348, 241 S.W.2d 423 (1951); *Tennessee Coble Television Assn v. Public Serv. Comm'n,* 844 S.W.2d 151 (Tenn. Ct. App. 1992).

VII. THE NEXTLINK CASE

In the disposition of these consolidated cases, our holding in the AT&T case is necessarily dispositive of the Nextlink case.

Nextlink Tennessee LLC, MCI Telecommunications Corporation and American Communications Services, Inc. are all "competing telecommunications service providers" within the meaning of Tennessee Code Annotated § 65-4-101(e) in competition with BST. All of these parties were allowed to intervene in the AT&T case and participate therein. Their application to intervene sought no specific relief for themselves but rather strongly supported the position of AT&T. When the TRA released its 1998 order

sustaining the position of AT&T, it granted the relief sought by AT&T without specific adjudication of the Nextlink, MCI, and ACSI interventions.

When BAPCO appealed the March 19, 1998 order in the AT&T case, no stay order issued, and the March 19, 1998 order remained effective. Tenn. Code Ann. § 4-5-322(c); *Underwood v. Liberty Mut. Ins. Co.*, 782 S.W.2d 175, 177 (Tenn. 1989). Nextlink then approached BAPCO about putting the name and commercial logo of Nextlink on the front cover of the BAPCO "White Pages" directory, only to be rebuffed by BAPCO on an assertion that the March 19, 1998 order only adjudicated the claim of AT&T and did not apply to Nextlink. On September 23, 1998, Nextlink filed its petition in this case seeking to compel BAPCO to comply with the declaratory order of March 19, 1998 as it related to Nextlink and to implement sanctions against BAPCO.

The Nextlink case was heard on oral argument on October 15, 1998, and on November 2, 1998, TRA entered an order enforcing Rule 1220-4-2-.15 against BAPCO holding in pertinent part:

> The fundamental issue raised by NEXTLINK's petition and BAPCO's response is whether the Authority may enforce TRA Rule 1220-4-2-.15, as interpreted in the Declaratory Order, pending appeal of the Declaratory Order. On October 15, 1998, following the submission of briefs and oral arguments, the Authority deliberated and concluded that, in the absence of a stay of the Declaratory Order, BAPCO must comply with TRA Rule 1220-4-2-.15 as interpreted in the Authority's Declaratory Order of March 19, 1998, and as applied to all similarly situated carriers. In support of that decision, the Authority makes the following findings of fact and conclusions of law.
>
> 1. NEXTLINK is a certified, competitive local exchange telephone company. *See* Docket No. 95-02502

(September 29, 1995) and Docket No. 96-00728 (April 12, 1996). NEXTLINK offers local telephone service to subscribers in Memphis and Nashville in competition with BellSouth. *See* Docket No. 97-00309, Tr. Vol. VIII B, pages 112-113. NEXTLINK's customer listings are contained within the White Pages directories published by BAPCO on behalf of BellSouth. *See* Docket No. 97-00309, Tr. Vol. XIA, pages 10-11. As required by federal law, the White Page Directories published by BAPCO on behalf of BellSouth must include the names and telephone numbers of NEXTLINK's local customers. The facts from the foregoing dockets were officially noticed by the Authority in a letter dated October 16, 1998, without objection from the parties.

2. In its Declaratory Order, the Authority declared that the rule on White Pages directories applies to competitive local exchange carriers and that such carriers should be allowed the opportunity to appear on the cover of the White Pages under the same terms and conditions as BellSouth itself. Although the ordering clause of the decision grants relief only to AT&T, the Order was based squarely on the Authority's interpretation and application of the agency's rule on White Pages directories and therefore, the agency's holding concerning the interpretation of the rule must not be applied only to AT&T but it must equally be applied to all similarly situated carriers that seek the same relief.

By definition, an agency rule is a "statement of general applicability." *See* Tenn. Code Ann. § 4-5-102(10). Consequently, an interpretation of a rule necessarily applies to all similarly situated companies. NEXTLINK is similarly situated to AT&T in that it too is a certificated competing local exchange provider. Moreover, NEXTLINK, is in fact, providing service. Therefore, since there are no relevant differences between NEXTLINK and AT&T regarding the application of the

rule on White Pages directories, no contested case hearing was required on this issue.

3. In the absence of a stay, the Authority's decision in its Declaratory Order remains in effect pending appeal. Under Tennessee law, the filing of a petition for review "does not itself stay enforcement of the agency decision." *See* Tenn. Code Ann. § 4-5-322(c). BAPCO itself concedes that the Declaratory Order is now in effect, at least as it applies to BAPCO and AT&T. *See* also Transcript of October 15, 1998, at 32. Therefore, the Authority's interpretation of Rule 1220-4-2-.15 is effective and enforceable. *See Underwood v. Liberty Mutual*, 782 S.W.2d 175, 177 (Tenn. 1989) holding that "judgment may continue to be enforced pending an appeal unless a stay is ordered."

4. BAPCO's argument that NEXTLINK's claim is barred by *res judicata* is not persuasive. Similarly, BAPCO's argument that the Authority cannot now modify the terms of the Declaratory Order has no merit, because NEXTLINK has not asked the Authority to amend its Declaratory Order nor is any such modification necessary to grant NEXTLINK's petition. The Declaratory Order interprets and applies the Authority's rule as to White Pages directories and that interpretation necessarily applies to any other, similarly situated carrier covered by that rule.

5. In its Declaratory Order, the Authority directed BAPCO to negotiate with AT&T for "the same terms and conditions" which BAPCO offers to BellSouth. BAPCO acknowledges that no such terms and conditions exist at this time. *See* Transcript of October 15, 1998, at p. 6. BAPCO is therefore obliged to negotiate with NEXTLINK for the opportunity to appear on the cover of the White Pages directories in a size and style comparable to the name and logo of BellSouth.

In Re: Petition of Nextlink to Sanction Bellsouth, Order enforcing T.R.A. Rule 120-4-2-.15 and denying sanctions, Tenn. Regulatory Auth. No. 98-00654 (Nov. 2, 1998) (footnotes omitted).

TRA declined to impose sanctions upon BAPCO and BAPCO timely appealed the November 2, 1998 order.

BAPCO on appeal asserts three issues.

1. That BAPCO's procedural due process rights were violated when the TRA refused to allow BAPCO to submit evidence on whether or not Nextlink was a "similarly situated competitive local exchange carrier."

2. The March 19, 1998 order, which is the subject of the AT&T appeal, is *res judicata* of the claims of Nextlink.

3. That BAPCO's appeal of the AT&T order divested the TRA of any jurisdiction of the Nextlink case.

The TRA's November 2, 1998 order is so completely and correctly dispositive of these three issues on appeal as to require little discussion. Nextlink is a certified, competitive local exchange telephone company providing local service in competition with BST, and its White Pages customers are published in the BAPCO "White Pages" directories. It is, thus, in the only context at issue, "similarly situated" as a matter of law, and further proof is neither necessary nor proper.

> If the agency and the individual disagree only with respect to the way in which the law applies to an uncontroverted set of facts, additional procedures cannot possibly enhance the accuracy of the factfinding process, simply because the agency does not need to resolve any factual controversies. This is a familiar principle that administrative law borrows from the concept of summary judgment in civil procedure.

Kenneth C. Davis & Richard S. Pierce, Sr., *Administrative Law Treaties,* § 9.5 (3d ed. 1994).

Likewise, *res judicata* is not applicable to this case. Intervention in this case is governed by Tennessee Code Annotated § 4-5-310 and not by Rule 24 of the Tennessee Rules of Civil Procedure. Rule 24.03 Tennessee Rules of Civil Procedure provides that one seeking to intervene must accompany his intervention motion with a "... pleading setting forth the claim or defense for which intervention is sought." Tenn. R. App. P. R. 24.03. Tennessee Code Annotated § 4-5-310 does not require a petitioner for intervention to seek affirmative relief. In the AT&T case Nextlink did not seek or receive specific affirmative relief.

In the AT&T action for a declaratory order TRA Rule 1220-4-2-.15 was already long in existence having been adopted in 1968. The AT&T adjudication sought an interpretation of this rule.

> Administrative agencies typically perform both legislative and adjudicative functions. These functions are closely related, and the line between them is not always clear.
>
> Rule making is essentially a legislative function because it is primarily concerned with considerations of policy. It is the process by which an agency lays down new prescriptions to govern the future conduct of those subject to its authority.

Tennessee Cable, 844 S.W.2d at 160-61 (citations omitted).

In the *AT&T* case the TRA interpreted its rule. The *Nextlink* case sought to enforce the previous interpretation of this same rule. Application of this rule is an executive or administrative function. *In re: Cumberland Power Co.*, 147 Tenn. 504, 509-513, 249 S.W. 818, 819-20 (1923). The TRA correctly held that Nextlink is not barred by *res judicata*.

Finally, no stay order having been issued in the AT&T appeal, the TRA was free to enforce its decision in the Nextlink proceeding. *See* Tenn. Code Ann. § 4-5-322(c).

IX. CONCLUSION

Because we find that neither state nor federal law allows the TRA to compel BAPCO to brand its White Pages *cover* with the name and commercial logo of "competing telecommunications service providers" in competition with BST, and because we further find, as articulated by Judge Koch in his separate concurring opinion, that such order imposes "forced speech" upon BAPCO in violation of the First Amendment of the Constitution of the United States, both the AT&T case and the Nextlink case are reversed. The issues of alleged violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, together with the trademark issues asserted in the AT&T case, are pretermitted. The other issues raised by BAPCO in the Nextlink case are without merit. Costs of the AT&T case are assessed against AT&T. Costs of the Nextlink case are assessed one-half against Nextlink and one-half against BAPCO.

WILLIAM B. CAIN, JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 1999 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY, ET AL.

Appeal from the Tennessee Regulatory Authority
Nos. 96-01692 & 98-00654

Nos. M1998-0987-C0A-R12-CV & M1998-01012-COA-R12-CV

Filed February 16, 2001

WILLIAM C. KOCH, JR., J., concurring.

This appeal presents a relatively straightforward question of state law – whether Tenn. Comp. R.& Regs. r. 1220-4-2-.15 (1999) is broad enough to empower the Tennessee Regulatory Authority to compel BellSouth Advertising & Publishing Corporation ("BAPCO") to permit competing local exchange carriers to place their names and logos on the cover of the white pages directories that BAPCO publishes for BellSouth Telecommunications, Inc. Despite the lengthy analyses of the federal Telecommunications Act of 1996 in the opinions prepared by Judges Cain and Cottrell, the answer to this question can be found in the plain language of the state regulation. Like the TRA's chairman, I find that the regulation cannot be stretched to apply to the current competitive local telephone market. In addition, I find that the TRA's effort to compel BAPCO to place the names and logos of BellSouth Telecommunications, Inc.'s competitors on the cover of its white pages telephone directory violates U.S. Const. amend. I and Tenn. Const. art. l, § 19.

I.

CHANGES IN FEDERAL TELECOMMUNICATIONS POLICY

For almost two decades after telephone service was first offered in 1877, the Bell System[1] enjoyed a monopoly in both the interstate and intrastate telephone markets. However, this market dominance began to evaporate when several key patents controlled by the Bell System expired in 1893 and 1894. *AT&T Corp. v. Iowa Utils. Bd,* 525 U.S. 366, 403, 119 S. Ct. 721, 741 (1999) (Thomas, J., concurring in part and dissenting in part). During the ensuing years, many independent telephone companies entered the telephone market and built rival networks to compete with the Bell System.

The Bell System responded to this competition by advocating the need for centralized governmental regulation of telephone markets. It argued that telephone service was inherently monopolistic and that competition was wasteful because it would lead to the unwarranted duplication of expensive physical facilities. *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. at 389, 119 S. Ct. at 735 (Thomas, J., concurring in part and dissenting in part). These arguments proved persuasive, and the federal government as well as many state governments, established commissions to regulate telephone service.[18] Thus, there arose a dual system of governmental

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[1] For the purposes of this opinion, the "Bell System" refers to the Alexander Graham Bell's telephone company which came to be known as American Telephone & Telegraph Company ("AT&T"), as well as to its later created subsidiary and affiliated companies, including Bell Telephone Laboratories, Inc., Western Electric Company, and the twenty-two operating companies providing local telephone service.

[18] The Mann-Elkins Act of 1910 extended the jurisdiction of the Interstate Commerce Commission to cover the interstate and (cont'd)

regulation for telephone service. The federal government, first through the Interstate Commerce Commission and later through the Federal Communications Commission, regulated the interstate and international aspects of telephone service, and the various states regulated intrastate local telephone service. These federal and state regulatory schemes were considered to be distinctly separate. *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 148, 51 S. Ct. 65, 68 (1930).

State regulation of intrastate telephone service reflected the Bell System's belief that telephone service was essentially monopolistic. Typically, states granted one telephone service provider an exclusive franchise in each local service area and then prohibited other competitors from entering the market. Over time, the Bell System again assumed a commanding position in both the interstate and intrastate telephone markets as a result of its policy to buy out competitors and the state governments' practice of prohibiting competitive entry into local telephone markets. *AT&T Corp. v. Iowa Utils. Bd,* 525 U.S. at 403, 119 S. Ct. at 741 (Thomas, J., concurring in part and dissenting in part). It controlled virtually all interstate long-distance telephone service, most local telephone service, a substantial amount of telephone equipment manufacturing, and one of the leading communications research and development facilities in the world. *AT&T Corp. v. Iowa Utils. Bd,* 525 U.S. at 413, 119 S. Ct. at 746 (Breyer, J., concurring in part and dissenting in part); *United States v. American Tel & Tel. Co.*, 552 F. Supp. 131, 222 (D.D.C. 1982).

(... cont'd)

international aspects of telephone service. By 1915, most states had created public utilities commissions and had empowered these commissions to regulate telephone service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U. S. at 403, 119 S. Ct. at 741 (Thomas, J., concurring in part and dissenting in part).

The Bell System's dominance of the telecommunications industry ended in 1982 when the United States District Court for the District of Columbia issued a decree settling a series of antitrust actions brought by the United States against various Bell System companies. The District Court concluded that the key to the Bell System's ability to maintain its market dominance was its control over local telephone service. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 223. Accordingly, the central remedy approved by the District Court required AT&T to divest itself of the twenty-two operating companies that were providing local telephone service. The decree prohibited these operating companies from providing long distance telephone service or manufacturing telephone equipment but permitted them to market customer premises equipment and to produce, publish, and distribute yellow pages directories.

In apparent recognition of the monopolies over local telephone service permitted by the states, the decree stated explicitly that the twenty-two operating companies "will possess monopoly power over local telephone service." *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 224. Thus, the antitrust consent decree did not introduce competition into the local telecommunications market but rather left each market in the hands of a single state-regulated local telephone service provider. *AT&T Corp. v. Iowa Utils. Bd,* 525 U.S. at 413-14, 119 S. Ct. at 746 (Breyer, J., concurring in part and dissenting in part).

Competition was not reintroduced to the local telecommunications markets until the Congress enacted the Telecommunications Act of 1996[19] The Act fundamentally restructured local telephone markets by preempting state

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[19] Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 251 *et seq.).*

laws that had protected the existing local telephone service providers from competition. It also encouraged competition in these markets by requiring existing local telephone service providers to share their existing networks with their competitors rather than requiring these competitors to construct their own networks. The Act also provided a legal process through which local telephone service providers could enter the long distance market from which they had been excluded since 1982.

Despite these fundamental changes in the federal telecommunications policy, the Congress did not displace the role played by the states in the regulation of local telephone service providers. The Telecommunications Act of 1996 itself clearly gives the state regulatory commissions a pivotal role in implementing telecommunications policy. *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 672 (Tenn. Ct. App. 1997). State commissions are required to assure that existing local telephone service providers comply with 47 U.S.C.A. § 251 and the pricing standards in 47 U.S.C.A. § 252(d) and to provide a forum for resolving disputes between existing local telephone service providers and their competitors seeking access to an existing telephone network.

II.
CHANGES IN TENNESSEE'S TELECOMMUNICATIONS REGULATORY POLICY

Tennessee's statutes regulating local telephone service providers were undergoing a similar transformation at the same time the Congress was considering the Telecommunications Act of 1996. Because the Congress had been working to bring competition to local telephone markets for several years, the Tennessee General Assembly was aware of the impending changes in the federal regulatory policies regarding local telephone service. Demonstrating remarkable legislative prescience, the General Assembly enacted sweeping reforms to Tennessee's regulation of local telephone service providers in 1995. First, it replaced the

Tennessee Public Service Commission with the Tennessee Regulatory Authority.[20] Second, the General Assembly replaced the statutes granting monopolies to existing local telephone service providers with statutes designed to permit competition in all telecommunications markets.[21] Tenn. Code Ann. § 65-4-123 (Supp. 2000). Anticipating the Telecommunications Act of 1996, Tenn. Code Ann. § 65-4-124(a) (Supp. 2000) requires existing local telephone service providers to furnish other providers nondiscriminatory interconnection to their public networks.

III.
WHITE PAGES DIRECTORY LISTINGS

Printed white pages telephone directories have traditionally been an integral part of local telephone service. These directories, which contain the names, addresses, and telephone numbers of the persons living in a particular local calling area, provide a convenient, inexpensive means for obtaining telephone numbers. Without these directories, or some other similarly convenient means for obtaining the same information, a local telephone network cannot provide ubiquitous telecommunications services in its calling area because the public will not have ready access to the telephone numbers needed to use the service.

Because of the importance of providing convenient access to subscribers' telephone listings, the Tennessee Public Service Commission and now the TRA has, at least since 1968, required local telephone service providers to publish a telephone directory listing the name, address, and telephone number of all their customers, except for the customers who have requested an unlisted number. Tenn.

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[20] Act of May 24, 1995, ch. 305, 1995 Tenn. Pub. Acts 450.

[21] Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts 703.

Comp. R. & Regs. r. 1220-4-2-.15(l) (1999). When the General Assembly opened up the local telephone markets to competition in 1995, it directed the TRA to promulgate rules ensuring that all local telephone service providers providing "basic local exchange telephone service" must supply each customer with a "basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c).[22]

The Telecommunications Act of 1996 likewise reflects the Congress's awareness of the importance of white pages directory listings. The Act requires local telephone service providers desiring to furnish long distance telephone service to provide white pages directory listings for customers of the other local telephone service providers serving the same area. 47 U.S.C.A. § 271(c)(2)(B)(viii) (West Supp. 2000). Similarly, 47 U.S.C.A. § 222(e) (West Supp. 2000) requires telephone service providers to make subscriber information available to directory publishers on a nondiscriminatory basis, and 47 U.S.C.A. § 251(b)(3) (West Supp. 2000) requires telephone service providers to provide "dialing parity" to their local competitors by giving nondiscriminatory access to telephone numbers and directory listings with no unreasonable delay.

In implementing the Telecommunications Act of 1996, the Federal Communications Commission ("FCC") promulgated rules relating to nondiscriminatory access to telephone numbers and directory listings. These rules also require local telephone companies to permit their competitors access to telephone numbers and directory listings on a nondiscriminatory basis. 47 C.F.R. § 51.217(c)(1), (3) (1999). Accordingly, the FCC has emphasized the local

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[22] Rather than promulgating a new rule, the TRA has apparently relied on Tenn. Comp. R. & Regs. r. 1220-4-2-.15 to discharge this responsibility.

telephone service providers must provide their competitors with the same access to directory information and listings that they have. 47 C.F.R. § 51.27 1 (a)(2)(ii); *In re Implementation of the Telecommunications Act of 1996, Third Report and Rule in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-273* (Sept. 9, 1999). Construing the FCC's rules and orders, one United States District Court has held that an exiting local telephone service provider that publishes a white pages telephone directory must place the listings of its competitors' subscribers in its directory in a nondiscriminatory manner. *U.S. West Communications, Inc. v Hix,* 93 F. Supp. 2d 1115, 1132 (D. Colo. 2000).

All these authorities establish beyond question that white pages directory listings are network elements subject to state and federal regulatory oversight. The term "network elements" includes more than simply the physical facilities and equipment of a local telephone service provider. *AT&T v. Iowa Utils. Bd.,* 525 U.S. at 388, 119 S. Ct. at 734. While there is a point where a particular feature is too remote to be considered a network element, *MCI Telecomm. Corp. v. GTE Northwest, Inc.,* 41 F. Supp.2d 1157, 1180-81 (D. Or. 1999), the directory listings necessary to provide telephone service to local customers are integral parts of a local telephone network and are, therefore, network elements. *AT&T of Va. v. Bell-Atlantic Va., Inc.,* 197 F.3d 663, 674 (4th Cir. 1999).

In clear contrast to the state and federal treatment of the listings in white pages telephone directories, there has been very little regulatory attention paid to the covers of white pages telephone directories. This is understandable because a telephone directory's cover is far less important than its contents. I can find no federal statute or regulation touching on white pages directory covers or any other federal precedent relating to the content of white pages directory covers. There is a similar dearth of state authority regarding

white pages directory covers. The only mention of the covers of white pages telephone directories appears in Tenn. Comp. R. & Regs. r. 1220-4-2-.15(3) which directs that "[t]he name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover." As discussed in Section V of this opinion, this regulation is outmoded because it was promulgated at a time when local telephone service providers in Tennessee monopolized the local markets they served.

Unlike the entries in a white pages telephone directory, the cover does not significantly assist the public's use of a local telephone network. Accordingly, I would conclude that the cover of a white pages telephone directory is a feature that is too remote to be considered a network element.

IV.
BELLSOUTH'S WHITE PAGES TELEPHONE DIRECTORIES

In February 1996, contemporaneous with the effective date of the Telecommunications Act of 1996, BAPCO and AT&T began negotiating for directory publishing services. There was no dispute about the terms and conditions for including the listings for AT&T's customers in the white pages telephone directories. However, virtually from the outset of the negotiations, AT&T insisted that its logo appear somewhere on the cover of these directories and offered to pay for this service. Even though BAPCO was concerned about possible confusion regarding the authorship of its directories, it decided to accommodate AT&T's request as long as (1) BAPCO retained control of the size, appearance, and location of the logo and (2) AT&T agreed not to use its logo on the covers of other white pages directories published by BAPCO's competitors.

BAPCO sent AT&T several mock-ups of covers showing possible ways that AT&T's logo could be incorporated. AT&T responded to these proposals by suggesting that BAPCO remove its own logo from the cover. Eventually,

the negotiations reached an impasse because AT&T refused to refrain from placing its logo on the covers of directories published by BAPCO's competitors. At this juncture, AT&T, invoking the arbitration provisions in the Telecommunications Act of 1996, requested the Tennessee Regulatory Authority("TRA") to arbitrate its demand that its name and logo be placed on the cover of the white pages directories published by BAPCO for BellSouth Telecommunications, Inc. On October 21, 1996, the TRA rejected this petition on the ground that the contents of the cover of white pages directories was not arbitrable under 47 U.S.C. § 252[23]

Not to be deterred, AT&T filed a petition with the TRA on December 16, 1996, seeking a declaratory order that Tenn. Comp. R. & Regs. r. 1220-4-2-.15 (1999) required that its name and logo be placed on the cover of the white pages directories prepared for BellSouth Telecommunications, Inc. by BAPCO. The TRA later permitted three other new local telephone service providers, MCI Telecommunications Corporation, NEXTLINK Tennessee, LLC ("NEXTLINK"), and American Communications Services, Inc., to intervene in the proceeding. Following a July 1997 hearing, the TRA issued an order on March 19, 1998. Invoking Tenn. Comp. R. & Regs. r. 1220-4-2-.15, the TRA directed BAPCO to provide AT&T with the opportunity "to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and

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[23] The TRA's conclusion regarding arbitrability is similar to conclusions reached by its counterparts in Alabama, Florida, Georgia, Kentucky, Illinois, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, and Vermont.

conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT&T in a just and reasonable manner."

BAPCO perfected a timely appeal to this court. While this appeal was pending, NEXTLINK, relying on the TRA's March 19, 1998 order, requested BAPCO to include its name and logo on the directories BAPCO prepared for BellSouth Telecommunications, Inc. When BAPCO refused its request, NEXTLINK sought relief from the TRA. Following a hearing in October 1998, the TRA entered an order on November 12, 1998, concluding that its interpretation of Tenn. Comp. R. & Regs. r. 1220-4-2-.15 in its March 19, 1998 order required BAPCO to include NEXTLINK'S name and logo on its directories. BAPCO again appealed. We have consolidated the appeals involving AT&T and NEXTLINK because they share common questions of law and fact.

V.
THE APPLICABILITY OF TENN. COMP. R. & REGS. R. 1120-4-2-.15

The majority of the TRA based its decision to order BAPCO to include AT&T's name and logo on the covers of the white pages telephone directories it was preparing for BellSouth Telecommunications, Inc. on Tenn. Comp. R. & Regs. r. 1120-4-2-.15. Accordingly, this appeal requires us to determine whether that regulation applies to the current dispute between BAPCO and AT&T.

The rules and principles of statutory construction also guide the courts in the task of interpreting administrative rules and regulations. *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993); *Rice v. Arizona Dep't of Econ. Sec.*, 901 P.2d 1242, 1246 (Ariz. Ct. App. 1993); *Board of Trustees of Univ. of Ill. v. Illinois Educ. Labor Relations Bd.*, 653 N.E.2d 882, 886-87 (Ill. Ct. App. 1995); 2 Charles H. Koch, *Administrative Law & Practice* § 11.26[2] (2d ed.

1997). Accordingly, our search for the meaning of a regulation begins with its words. *See Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 3 (Tenn. 1986). These words draw their meaning from the context of the entire regulation, *see Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994), and from the regulation's general purpose. *See City of Lenoir City v. State ex rel. City of Loudon*, 571 S.W.2d 297, 299 (Tenn. 1978). Unless the context requires otherwise, we read a regulation's works with an eye toward their straightforward and common sense meaning. *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 910 (6th Cir. 2000); *Westland West Cmty. Ass'n v. Knox County*, 948 S.W.2d 281, 283 (Tenn. 1997); *Wilson World, Inc. v. Tennessee Dep't of Transp., No.* 01A01-9001-CH-00031, 1990 WL 150034, at *3 (Tenn. Ct. App. Oct. 10, 1990) (No Tenn. R. App. P. 11 application filed).

The courts must give effect to unambiguous administrative regulations. *See Spencer v. Towson Moving & Storage, Inc.*, 922 S.W.2d 508, 510 (Tenn. 1996). Accordingly, there is no room for applying the rules of construction if the language of the regulation is plain and clear. *See Pursell v. First Am. Nat'l Bank*, 937 S.W.2d 838, 842 (Tenn. 1996). Thus, when the words of a regulation plainly mean one thing, we cannot give them another meaning under the guise of construing them. *See Henry v. White*, 194 Tenn. 192, 198, 250 S.W.2d 70, 72 (1952); *State ex rel. Barksdale v. Wilson*, 194 Tenn. 140, 144-45, 250 S.W.2d 49, 51 (1952).

Administrative regulations cannot be inconsistent with statutes covering the same subject. *Tasco Dev. & Bldg. Corp. v. Long*, 212 Tenn. 96, 102, 368 S.W.2d 65, 67 (1963); *Kaylor v. Bradley*, 912 S.W.2d 728, 734 (Tenn. Ct. App. 1995). When there is congruence between a regulation and applicable statutes, the courts must defer to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the plain language of the regulation. *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 356,

120 S. Ct. 1467, 1476 (2000); *Auer v. Robbins,* 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997); *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994).

Tenn. Comp. R. & Regs. r. 1220-4-2-.15 was enacted at a time when local telephone service providers monopolized their service areas. They had no competition from other local telephone service providers, and thus all residents of the area obtained telephone service from the same local telephone service provider. When viewed in this context, Tenn. Comp. R. & Regs. r. 1220-4-2-.15 makes perfect sense. The local service provider was required to publish a white pages directory containing the names, addresses, and telephone numbers of its customers, Tenn. Comp. R. & Regs. r. 1220-4-2-.15(1); it was also required to provide each of its customers with a copy of its directory, Tenn. Comp. R & Regs. r. 1220-4-2-.15(2); and it was required to place its name, the area covered by the directory, and the date the directory was issued on the cover of the directory. Tenn. Comp. R. & Regs. r. 1220-4-2-.15(3).

These regulatory provisions make far less sense and, in fact, prompt some absurd results when they are superimposed on a local calling area served by more than one local telephone service provider. As TRA Director Melvin Malone pointed out, the rule would require each local telephone service provider to produce a directory containing the listings of its subscribers. Thus, rather than prompting a single directory containing the listings for all telephone customers in a local calling area, the rule would precipitate the proliferation of many telephone directories. Not only would this cause great public inconvenience, it would also be inconsistent with the federal and state policy favoring a single white pages directory for each calling area. To avoid these results, I would agree with Judge Cain and Director Malone that Tenn. Comp. R. & Regs. r. 12204-2-.15 is inapplicable to current circumstances where more than one telephone service provider serves a local telephone market.

No amount of administrative or judicial construction can provide the additional substance needed for Tenn. Comp. R. & Regs. r. 1220-4-2-.15 to operate sensibly in a multi-provider market. The courts cannot graft onto the current rule provisions regarding the choice of the entity or entities responsible for preparing a single white pages directory, the determination of the costs to each local telephone service provider for including its subscribers in the directory, or the format of the content or the cover of the directory. The TRA is likewise unable to remedy the regulation's deficiency without following the UAPA's rulemaking procedures. In the absence of these necessary provisions, regulatory prudence cautions against placing the sort of reliance on Tenn. Comp. R. & Regs. r. 12204-2-.15 that the majority of the TRA placed on it.

Like Judge Cain and Director Malone, I find that Tenn. Comp. R. & Regs. r. 1220-4-2-.15 cannot be reasonably construed to apply to the current local telephone market in Tennessee. Thus, we are not required to defer to the TRA's interpretation of the rule because it is plainly erroneous and inconsistent with the plain meaning of the rule's language[24] If the regulation is inapplicable to the current competitive environment in Tennessee, then the TRA's order must be set aside because the rule forms the legal foundation for the TRA's decision. I would set aside the TRA's March 19, 1998 order because it lacks legal support.

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[24] Additional reasons exist for declining to defer to the TRA's interpretation of this rule. The record contains no evidence of long-standing history of either the TRA's or its predecessor's interpretation of this rule. In fact such history is non-existent because this case provided the TRA with its first opportunity to consider the rule in the multi-provider context. Moreover, the TRA can lay claim to no special expertise in applying the rules of construction or to marketing or intellectual property issues.

VI.
CONSTITUTIONAL LIMITS ON THE TRA'S AUTHORITY TO COMPEL COMMERCIAL SPEECH

Rather than grappling with the interpretative morass created by attempting to rely on Tenn. Comp. R. & Regs. r. 1220-4-2-.15, Judge Cottrell undertakes to salvage the TRA's decision by asserting that Tenn. Code Ann. §§ 65-4-123, -124(a) supply sufficient authority for the TRA's order in this case. I agree that the General Assembly has given the TRA authority to enter orders and promulgate rules to promote competition in Tennessee's local telephone markets. I also agree that these rules and orders may, to some extent, be directed at mitigating the effects of former monopolistic practices of the incumbent local telephone service providers. I do not agree, however, that the TRA has the authority to compel BAPCO to place the names and logos of BellSouth Telecommunications, Inc.'s competitors on the cover of BellSouth's white page directories. Neither BAPCO nor BellSouth Telecommunications, Inc. can be compelled to use their facilities to promote the commercial interests of their competitors.

Purely commercial speech is no longer considered to be unprotected by the federal and state constitutions. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772 & n.24, 96 S. Ct. 1817, 1830 & n.24 (1976); *Horner-Rausch Optical Co. v. Ashley*, 547 S.W.2d 577, 578-79 (Tenn. Ct. App. 1976). As long as the commercial speech is truthful and does not propose an illegal transaction, it is entitled to constitutional protection from unwarranted governmental interference. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183, 119 S. Ct. 1923, 1930 (1999); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980); *Bowden Bldg. Corp. v. Tennessee*

Real Estate Comm'n, 15 S.W.3d 434, 444-45 (Tenn. Ct. App. 1999).

The scope of the constitutional protection that commercial speech receives is another question. Truthful commercial speech currently does not receive the same level of constitutional protection as political or ideological expression. While the constitutional protection for non-broadcast political speech is near absolute, *United Foods, Inc. v. United States,* 197 F.3d 221, 223 (6th Cir. 1999), *cert. granted* ____ *U.S.* ____, 121 S. Ct. 562 (2000), commercial speech receives what the Tennessee Supreme Court has called "qualified" constitutional protection. *H&L Messengers, Inc. v. City of Brentwood,* 577 S.W.2d 444, 451 (Tenn. 1979). Thus, governmental restrictions on commercial speech receive only "intermediate" scrutiny, as opposed to the strict scrutiny to which governmental restrictions on political or ideological speech are subjected, *Douglas v. State,* 921 S.W.2d 180, 184 (Tenn. 1996). Currently, the intermediate scrutiny test employed by the United States Supreme Court and the Tennessee Supreme Court is found in the *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* opinion. *Greater New Orleans Broad. Ass'n, Inc. v. United States,* 527 U.S. at 183, 119 S. Ct. at 1930 (declining requests to reexamine the *Central Hudson test*); *Douglas v. State,* 921 S.W.2d at 184.

The freedom of speech protected by U.S. Const. amend. I and Tenn. Const. art. I, § 19 includes the freedom to speak and the freedom to refrain from speaking. This principle has been applied not only in cases involving political or ideological speech, *Miami Herald v. Tornillo,* 418 U.S. 241, 254-58, 94 S. Ct. 2831, 2838-40 (1974) (holding that a newspaper may not be compelled to publish replies to stories by political candidates); *West Virginia v. Barnette,* 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943) (holding that school children may not be compelled to participate in a flag salute ceremony), but also financial activities such as charitable

fund-raising. *Riley v. National Fed'n for the Blind of N.C., Inc.*, 487 U. S. 781, 796-97, 108 S. Ct. 2667, 2677 (1988) (holding that professional fund-raisers may not be required to disclose the percentage of funds turned over to charity).

In light of the freedom to refrain from speaking, the United States Supreme Court has recognized that individuals and corporations may not be compelled to use their property or resources to advance the ideological views of others. *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n,* 475 U.S. 1, 20, 106 S. Ct. 903, 914 (1986) (holding that a regulatory commission may not compel a utility to include its environmental opponents' statements in its customer newsletter); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977) (holding that a person could not be compelled to display an objectionable state motto on their license plate).

The United States Supreme Court has departed from these principles in only one case involving compelled commercial speech. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130 (1997), involved a challenge to a marketing order promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. The order required all California growers of nectarines, plums, and peaches to make financial contributions to a common fund used to produce generic advertising extolling the benefits of "California Summer Fruits." The advertising was intended to promote the common interest of all producers of these fruits, and the Court "presumed" that all the producers agreed with the central message conveyed by the generic advertising. Rather than employing the *Central Hudson* test as the United States Court of Appeals for the Ninth Circuit had done, the *Glickman* Court determined that the challenged marketing order did not infringe the grower's First Amendment rights because (1) it was part of a pervasive governmental regulatory scheme that had replaced competition with

collectivization for the benefit of the producers, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 475-76, 117 S. Ct. at 2141, (2) it did not prevent the producers from doing their own advertising, (3) it did not require the producer to engage in any actual or symbolic speech, and (4) it did not compel the producer to endorse or to finance any political or ideological speech, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 469-70, 117 S. Ct. at 2138.

The *Glickman* Court considered the entire agricultural program as an economic regulation established by Congress that enabled competing agricultural producers to participate in joint ventures for their common benefit. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 476, 117 S. Ct. at 2141-42. Thus, it viewed the financial assessments for common advertising simply as the price the competing producers had to pay for the benefit of being protected from free competition in the marketplace.

The majority's decision in *Glickman v. Wileman Bros. & Elliott, Inc.* has not been without its critics, including four members of the United States Supreme Court. *Leading Case, Commercial Speech-Compelled Advertising,* 111 Harv. L. Rev. 319 (1997). The United States Court of Appeals for the Sixth Circuit has held that the *Glickman* holding applies only when the industry involved is no longer part of the free market because it has been "fully collectivized" by the government and the challenged regulation does not compel political or ideological speech. *United Foods, Inc. v. United States,* 197 F.3d at 224. Accordingly, the United States Court of Appeals for the Sixth Circuit invalidated a federal program requiring mushroom producers to contribute funds to a regional advertising program because no other part of the mushroom business was collectivized or regulated. *United Foods, Inc. v. United States,* 197 F.3d at 224-25.

Following the reasoning of the United States Court of Appeals for the Sixth Circuit in *United Foods, Inc. v. United States,* I would find that the *Glickman* decision does not

apply to the local telephone markets in Tennessee because the government is no longer protecting the local telephone service providers from competition. To the contrary, both the state and the federal governments are marching in the opposite direction — to return free competition to the local telephone market. In addition, nothing in the current state or federal regulatory scheme smacks of the sort of "collectivization" that is the earmark of the marketing program upheld in *Glickman*. Accordingly, the TRA's order must be tested against the constitutional standards normally applicable to compelled speech cases.

There is no question that BAPCO and BellSouth Telecommunications, Inc. have a constitutionally protected interest in not being forced to use their own resources, property, or funds to promote the financial interests of their competitors. Thus, the TRA's March 19, 1998 order can be upheld only if the TRA has some compelling justification for its order. I find no such justification in this case. Even if promoting competition in accordance with Tenn. Code Ann. § 65-4-123 could be considered a compelling justification, the TRA's order is more extensive than necessary to advance that interest.[25]

What purpose does placing the names and logos of BellSouth's competitors on the cover of the white pages telephone directory serve? Does it promote the ability of the public to identify the local telephone service providers who serve the calling area covered by the directory? There is

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[25] The *Central Hudson* test is generally applied when the government is attempting to regulate or prohibit commercial speech. It has not been used in compelled speech cases. However, I would reach the same result using that *Central Hudson* test because the TRA's order is more extensive than necessary to promote competition in the local telephone markets.

little direct evidence in this record that it does. What the record does demonstrate is that providing this information on the cover of the directory would simply be redundant because similar information in much more detail is already included in the directory itself. For example, the cover of the current white pages directory for Greater Nashville contains a statement that the directory contains customer listings for all local telecommunications companies. The "Customer Guides" section at the beginning of the directory contains the names of all the local telephone service providers, as well as their telephone numbers to establish service, to arrange for repairs, or to obtain billing information. Thus, even without the names and logos on their covers, BellSouth's white pages directories provide material assistance to anyone attempting to identify local telephone service providers in the particular local calling area covered by the directory.

Based on the record, I conclude that AT&T's demand that its name and logo appear on the cover of the white pages directory prepared by BAPCO for BellSouth Telecommunications, Inc. was motivated by a desire to increase the public awareness of its brand without incurring the expense of a marketing campaign. By forcing BAPCO to place its name and logo on the cover of BellSouth's white pages directories, AT&T can take advantage of the wide distribution of the BellSouth directories without bearing the expense associated with their distribution. Permitting AT&T to be a free rider in the name of promoting competition goes too far for constitutional purposes.

WILLIAM C. KOCH, JR.,
JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 1999 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY, ET AL.

Appeal from the Tennessee Regulatory Authority
No. 96-01692 & No. 98-00654

No. M1998-0987-COA-R12-CV &
M1998-01012-COA-R12-CV

Filed February 16, 2001

PATRICIA J. COTTRELL, J., dissenting.

The majority opinion, that written by Judge Cain, defines the question in this case as whether the TRA has jurisdiction to compel BAPCO to display the name and commercial logo of AT&T on the cover of its "White Pages" directory. Judge Cain concludes that the TRA has no such authority because (1) the branding of the cover of the incumbent service provider's directory is not a "network element" under federal law; (2) such branding is not an "essential public service," apparently incorporating a state law standard; and (3) BAPCO is not a utility and is not subject to regulation by the TRA in its "non-utility" endeavors. Judge Koch concludes that the directory cover is not a network element and that the TRA rule regarding listing of the telephone service provider on the directory cover cannot be interpreted to apply in a competitive provider environment. Both conclude that the TRA's order violates BAPCO's First Amendment rights.

First, I disagree with the majority's definition of the question. I would frame the issue as whether the TRA has

the authority to require the incumbent local exchange carrier, BST, to cause its legally-mandated directory to be published in a nondiscriminatory and competitively neutral manner.[1] Having re-defined the question, not surprisingly, I reach a different conclusion from that of my colleagues.

My conclusion is based on my analysis of state law, as set out later in this opinion, and the reasoning behind it can be summarized as follows. The TRA has "practically plenary authority" over the utility companies it regulates, including the providers of local telephone service. It has been clearly authorized by the legislature to "fix just and reasonable . . . practices" to be followed by utility companies. In addition, the TRA has been specifically directed to make competition among local telephone service providers fair. Among its duties is to enforce the statutory requirement that all local telephone service providers be able to obtain, from all other telecommunications providers, desired services on a non-discriminatory basis. Non-discriminatory means, among other things, that the provider cannot provide the services to itself or an affiliate on a more favorable basis than to competitors.

The provision of a white pages directory has long been considered an integral part of local telephone service, and no one would seriously question the TRA's authority to regulate it in the public interest. Because BST is required by state and

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[1] The TRA ruled that "in the publication of these directory listings on behalf of BellSouth which contain the listings of local customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same conditions to AT&T in a just and reasonable manner."

federal law to publish a directory and to include in that directory the names and numbers of competitors' customers, the TRA, in my opinion, clearly has authority to ensure that the directory is published in a manner that complies with all legal requirements. I would include in that the requirement that such services be provided in a non-discriminatory manner.

Second, I am puzzled by the conclusion of both my colleagues that the rule in question "cannot be stretched" to apply in a competitive environment. The subsection in question simply required that the name of the telephone utility shall appear on the front cover. The only "stretch" performed by the TRA was to interpret "the telephone utility" to have meant the utility whose customers are included in the directory.[2] Then, by extending the logic to the competitive environment, the TRA concluded that "if more than one utility's customers are inside the directory, then more than one utility's name would be on the cover."

The TRA's interpretation of the rule, in existence since 1968, is reasonable and based on the language of the rule. Its application of that interpretation to the current environment is not a "stretch" and is, instead, consistent with the rule's language and intent. It is also an interpretation that is well within the TRA's authority and expertise. In fact, my colleagues do not specifically object to that interpretation. Instead, they appear troubled by the TRA's ultimate decision, of which this rule interpretation is only a part, that requires the names and logos of competing service providers be placed on the cover in the same way that BST's name and

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[2] Judge Cain similarly interprets the rule in the monopoly environment: "there was only one telephone utility; that utility was the only local service provider, and thus, it was the only telephone utility locally serving the customers listed in the directory."

logo appears. That holding by the TRA is based on its interpretation of its responsibilities to promote competition and, in my opinion, is consistent with its statutory mandate and with regulatory actions by the FCC under federal law. For that reason, this opinion examines that regulatory environment in the aftermath of federal directives on competition.

My colleagues' reference to the requirement being placed on the publishing affiliate of BST does not imply a determinative distinction. As explained later in this opinion, there really is no publishing affiliate issue because BST is the entity required to publish a directory that includes its competitors customers. The TRA simply ordered BST to perform its directory publishing obligation in a competitively neutral manner. While requiring a company to list its competitors in the same manner it lists itself may seem unusual in other contexts, both the federal and state legislative bodies have determined that the only way to achieve the benefits of real competition is to authorize otherwise extraordinary regulatory measures in order to lessen the incumbent's control over factors affecting the ability of others to enter the market.

Finally, while I agree with Judge Koch that this is entirely a question of state law, I nonetheless feel compelled to address the conclusion reached by both my colleagues that directory covers or the branding of directory covers are not "network elements" under the federal Telecommunications Act of 1996. Similarly, I feel compelled to address the TRA's decision not to arbitrate the cover issue simply because both my colleagues attach some importance to that decision and because I disagree with them on the nature and effect of the TRA's action.

I. Background

This case involves only issues of state law; however, those issues must be analyzed in the context of recent

dramatic alterations in telecommunications regulation at both state and federal levels. Of particular relevance to the issues in this case, including the majority's discussion of the definition of "network element," is the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. For background purposes, the following explanation of the Act and its intended impact on the industry is helpful:

> The breakup of AT&T in the early 1980's brought competition to the long distance telephone market. The local market, however, has been a different story. Until the passage of the 1996 Act, state utility commissions continued to regulate local telephone service as a natural monopoly. Commissions typically granted a single company, called a local exchange carrier (LEC), an exclusive franchise to provide telephone service in a designated area. Under this protection the LEC built a local network — made up of elements such as loops (wires), switches, and transmission facilities — that connects telephones in the local calling area to each other and to long distance carriers.
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> The 1996 Act brought sweeping changes. It ended the monopolies that incumbent LECs held over local telephone service by preempting state laws that had protected the LECs from competition. *See* 47 U.S.C. § 253. Congress recognized, however, that removing the legal barriers to entry would not be enough, given current technology, to make local telephone markets competitive. In other words, it is economically impractical to duplicate the incumbent LEC's local network infrastructure. To get around this problem, the Act allows potential competitors, called competing local exchange carriers (CLECs), to enter the local telephone market by using the incumbent LEC's network or services in three ways. First, a CLEC may build its own network and "interconnect" with the network of an incumbent. *See id.* § 251(c)(2). Second, a CLEC may lease elements (loops,

> switches, etc.) of an incumbent LEC's network" on an unbundled basis." *See id.* § 25 1 (c)(3). Third, a CLEC may buy an incumbent LEC's retail services "at wholesale rates" and then resell those services to customers under its (the CLEC's) brand. *See id.* § 251(c)(4).
>
> The Act details procedures for allowing a CLEC access to the incumbent LEC's facilities and services. The CLEC first makes a request to the incumbent for interconnection or for access to its network or services. Thereafter, both parties must negotiate in good faith in an effort to reach agreement on terms and conditions (including price) of access. *See id.* §§ 251(c)(1), 252(a)(1). Negotiations fail — it is hard to see how they would not — either party may petition the state utility commission to arbitrate open issues. *See id.* § 252(b). The terms imposed by the state commission in arbitration must "meet the requirements of section 251 ... including the regulations prescribed by the [FCC] pursuant to section 251." *Id.* § 252(c)(1). The Act includes general standards for a state commission to use in arbitrating open price (or rate) issues. *See id.* §§ 251(c), 252(d). Finally, the Act authorizes any party aggrieved by the arbitration decision of a state commission to bring an action in federal district court to determine whether the arbitration decision "meets the requirements of" §§ 251 and 252. *See id.* § 252(e)(6).

GTE South, Inc. v. Morrison, 199 F.3d 733, 737 (4th Cir. 1999).

The parties herein entered into negotiations regarding their interconnection agreement, and the TRA was subsequently called upon to arbitrate open issues, applying federal law. The TRA declined to arbitrate the content of directory covers. Whether the TRA's refusal to arbitrate that issue, on whatever basis the decision was made, was proper under the Telecommunications Act is not before us. That

question would properly be appealed to a federal district court. *See* 47 U.S.C. § 252(e)(6);[3] *see also U.S. West Communications, Inc. v. Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997) (state court review of issues of whether the interconnection agreement meets the requirements of the Act is precluded); *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 n.16 (D. Or. 1999) (exclusive jurisdiction to determine compliance with the Act is conferred to federal courts).

Similarly, whether directory covers are "network elements," as the majority concludes they are not, or are otherwise subject to the nondiscriminatory access requirements of the Telecommunications Act is also not a question before us; such a question is outside our charge, being exclusively vested in federal courts. *See id.*

That is not to say, however, that discussion of the Act and its interpretations is irrelevant to our analysis. To the contrary, such discussion is necessary in order to understand the context of the TRA's order and the regulatory environment in which incumbent and competing providers of telephone services now operate. In addition, it will make clear the breadth of areas deemed appropriate for regulation, the universal treatment of directories as subject to regulation, and the degree of regulator intrusion into practices by incumbents authorized in order to foster real competitive opportunity in the local services market. Because I consider the majority's holding to be based on their view of the TRA's

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[3] That provision of the Telecommunications Act provides, "In any case in which a State commission makes a determination under [the Act], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [the Act]."

interpretation of its responsibilities to promote competition, rather than on the TRA's interpretation of "the telephone utility" in Rule 1220-4-2-.15(3), this background is essential.

II. Nondiscriminatory Access Obligations of Incumbent Providers

The Telecommunications Act of 1996 imposes a number of duties upon an incumbent local exchange carrier that are intended to facilitate market entry by competing carriers. *See AT&T Corp. v. Iowa Utils. Bd,* 525 U.S. 366, 371, 119 S.Ct. 721, 726 (1999). A nondiscriminatory access requirement appears in various separate provisions of the Act, at least two of which are related to the discussion of the issues herein. Section 251(c) imposes on the incumbent LEC "the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. . ." 47 USC § 251(c)(3). Section 251(b) imposes upon an ILEC "the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays." 47 U.S.C. § 251(b)(3).

Thus, a "network element" finding is not the only basis upon which nondiscriminatory access obligations can be imposed. As detailed below, the FCC has considered the nondiscriminatory access requirement of subsection (b) in the context of various directory issues. In addition, BST is subject to other provisions of the Act not necessarily applicable to all incumbent LECs. As a Bell operating

company,[4] BST is authorized by the Telecommunications Act to provide long distance services only if BST meets certain requirements in its interconnection agreements with competing providers of telephone exchange services. *See* 47 U.S.C. § 271 (special provisions concerning Bell operating companies).[5] Included in those requirements is a competitive

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[4] It is undisputed that BST meets the statutory definition of a Bell operating company, *see* 47 U.S.C. § 153(4); the TRA stated that the Act provides that "any Bell operating company, such as BellSouth, that seeks to enter the long distance market must list customers of competing local exchange carriers, such as AT&T, in its White pages directory listings"; the record includes BellSouth Corporation's description of its history which demonstrates its status as a Bell operating company; and the record includes evidence BST or BellSouth Corporation intends to enter the long distance market.

[5] In a dissent in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999), Justice Breyer discussed the background for these requirements, beginning with the effect of the consent decree in the antitrust case against AT&T:

> At the same time, the decree forbade most such local service suppliers from entering long-distance markets, *United States v. American Tel. & Tel. Co., supra,* at 186-188. That prohibition, by preventing entry by local firms willing and able to supply long-distance service, risked less long distance competition. *Cf.* P. MacAvoy, The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services 179-183 (1996). But the decree reflected a countervailing concern. Local firms might enjoy special long-distance advantages not available to purely long-distance companies. *See United States v. American Tel. & Tel., supra,* at 186-188. Perhaps a local service company would find it unusually easy to attract local customers to its long distance service; perhaps it could use its control of local service to place

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its long-distance competitors at a disadvantage. See T. Krattenmaker, Telecommunications Law and Policy 411-412 (2d ed. 1998) (explaining rationale of the decree). And though some argued that any such special advantages were innocent, rather like those enjoyed by a transcontinental airline that dominates a local hub, others claimed they were unfair, like those that had once helped AT&T (through its control of local service) maintain long-distance dominance. *See United States v. American Tel. & Tel. supra,* at 165; *see generally* A. Kahn, Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness 37-38 and n.53 (1998) (discussing the debate). Whether the decree's trade-off made sense — *i.e.,* whether the existence of some such local-firm/long-distance-service advantage warranted the decree's prohibition limiting the number of potential long-distance competitors — became a fertile source for later argument. *See, e.g.,* MacAvoy, *supra,* at 171-177 (arguing that oligopolistic conditions in long-distance markets have produced supranormal profits that would not be sustainable with increased competition); Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications*, 5 Yale J. Reg. 517, 537 (1988) (arguing that the rationale for the decree's restrictions on local service companies was "just as persuasive" as that underlying the decree).

The Act before us [the 1996 Telecommunications Act] responds to this argument by changing the post-decree status quo in two important ways. First, it creates a legal method through which local telephone service companies may enter long-distance markets, thereby providing additional long distance competition. *See* 47 U.S.C. § 271(c)(2)(B) (1994 ed., Supp. II) (listing

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checklist which, among other things, requires BST to provide "white pages directory listings for customers of the other carrier's telephone exchange service." 47 U.S.C. § 271(c)(2)(B)(viii).[6]

(... cont'd)

> 14 conditions that, if met, permit incumbent local firms to enter long-distance market). Second, if conditions that long distance entry upon either (1) the introduction of competition into local markets, or (2) the failure of a competing carrier to request access to or interconnection with the local service supplier (or the competing carrier's failure to engage in "good faith" negotiations). §§ 271(c)(1)(A), (B). The existence of these two alternatives is important. In setting forth the first alternative, actual local competition, the statute recognizes that local service competition would diminish any special long-distance advantages that the local firm has, thereby lessening the need for the decree's long-distance market entry prohibition. *See supra,* at 747; Krattenmaker, *The Telecommunications Act of 1996*, 49 Fed. Comm. L.J. 1, 15-16 (1996). In setting forth the second alternative, the Act recognizes that actual local competition might not prove practical; in some places, to some extent, local markets may not support more than a single firm, at least not without wasteful duplication of resources. *See Note, The FCC and the Telecom Act of.1996; Necessary Steps to Achieve Substantial Deregulation,* 11 Harv. J.L. & Tech. 797, 810, n. 57 (1998).

Iowa Utils. Bd., 525 U.S. at 414-16, 119 S. Ct. at 746-47 (Breyer, J., dissenting).

[6] Some of the other items on the competitive checklist are (1) interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1), 47 U.S.C. §271(c)(2)(B)(i); (2) nondiscriminatory access to network elements in accordance with (cont'd)

Thus, federal law requires BST to include AT&T's customers, as well as customers of other CLECs, in the "White Pages" directories it is otherwise required to publish. State statute also requires all telecommunications services providers who offer basic local exchange service to "provide each customer a basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c). If nothing else, these specific statutory requirements establish that directories are part of telephone services and subject to regulation.

A. FCC Interpretations of the Act's Obligations

A 1938 amendment to the Communications Act of 1934 provided that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." 47 U.S.C. § 201(b). After the FCC issued rules and orders to implement the local competition provisions of the Telecommunications Act of 1996, various incumbent LECs and state utility commissions brought lawsuits challenging the FCC's authority to regulate intrastate telecommunications, long a province of the states. *See Iowa Utils. Bd,* 525 U.S. at 374, 119 S.Ct. at 728. The Supreme Court held that, by specifically directing that the Telecommunications Act of 1996 be inserted into the Communications Act of 1934, Congress had given the FCC authority to implement the 1996 Act. "We think that the

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(... cont'd)

the requirements of sections 251(c)(3) and 252(d)(1) [of the Act], 47 U.S.C. § 271(c)(2)(B)(ii); (3) nondiscriminatory access to . . . directory assistance services to allow the other carrier's customers to obtain telephone numbers, 47 U.S.C. § 271(c)(2)(B)(vii); (4) nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) [of the Act], 47 U.S.C. § 271(c)(2)(B)(xii). *See* 47 U.S.C. § 271(c)(2)(B).

grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996." *Id.*, 525 U.S. at 378, 119 S.Ct. at 730. The Court also described Congress's passage of the Telecommunications Act of 1996 as ending "the longstanding regime of state-sanctioned monopolies" in the provision of local telephone service and stated, "States may no longer enforce laws that impede competition. . . ." *Id.*, 525 U.S. at 371, 119 S. Ct. at 726.

Having found that the FCC had authority to regulate local competition, the Court considered the incumbent LECs' complaint that in its First Report and Order the FCC had "included within the features and services that must be provided to competitors . . . items that do not (as they must) meet the statutory definition of 'network element' — namely, operator services and directory assistance, operational support systems (OSS), and vertical switching functions . . ." *Id.*, 525 U.S. at 386, 119 S. Ct. at 734. Essentially, the incumbent LECs argued that the FCC had no authority to interpret the 1996 Telecommunications Act's term "network element" to include functions that are not part of the physical facilities and equipment used to provide local telephone service. The Supreme Court found it impossible to credit this argument in view of the statute's broad definition and held, "Operator services and directory assistance, whether they involve live operators or automation, are 'features, functions, and capabilities . . . provided by means of the network equipment.'" *Id.*, 525 U.S. at 387, 119 S. Ct. at 734.

Pursuant to its responsibilities under the Telecommunications Act, on August 8, 1996, the FCC

released its First Report and Order[7] and its Second Report and Order.[8] The FCC has described the First Report and Order as eliminating legal and technical barriers to competition in local exchange service and the Second Report and Order as interpreting and implementing various subsections of § 251 of the Act which related to operational barriers to competition. *See* Second Report and Order ¶¶ 2, 3. As reflected in these orders, the FCC early recognized the separate sources for obligations of the incumbent LEC to provide to competitors nondiscriminatory access to various components involved in the provision of local exchange service.

The FCC has recognized the pro-competitive policy directives of the Act and has performed its implementation and interpretation duties accordingly. Significantly, the TRA has based its order herein on the state legislative directive that the TRA foster competition. The FCC's treatment of the federal Act's nondiscriminatory access provisions is relevant for comparison with the TRA's treatment of state law requirements for the provision of services to other providers on a nondiscriminatory basis. Also significant to our case is the FCC's unquestioned recognition that directory publication is subject to regulation and subject to examination for noncompetitive implications.

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[7] *In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (rel. Aug. 8, 1996).

[8] *In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Second Report and Order and Memorandum Opinion and Order (rel. Aug.8, 1996) ("Second Report and Order").

The Third Report and Order,[9] released September 9, 1999, included an order on reconsideration of the FCC's prior local competition orders and addressed non-discriminatory access obligations imposed on incumbent local exchange carriers under Section 251(b)(3) of the Act. *See id.* As a background to its September 1999 orders, the FCC explained:

> In the *Local Competition Second Report and Order,* the Commission promulgated rules and policies to require incumbent LECs to provide competitors with access to the incumbent LECs' networks sufficient to **create a competitively neutral playing field** for new entrants consistent with section 251(b)(3). Among these rules, the Commission required incumbent LECs to provide nondiscriminatory access to directory assistance and directory listings to ensure that customers of all LECs would have access to accurate directory assistance information. As the Commission stated in the *Local Competition Second Report and Order,* dialing parity, nondiscriminatory access, network disclosure, and numbering administration issues are critical issues for the development of local competition. **The Commission noted that potential competitors in the local and long distance markets face numerous operational barriers to entry notwithstanding their legal right under the Act to enter such markets.** In the *Local Competition Second Report and Order,* the Commission adopted rules to implement the dialing parity, nondiscriminatory access, numbering administration, and network disclosure

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[9] *In Re implementation of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 96115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273* (rel. Sept. 9, 1999) ("Third Report and Order").

> requirements of the 1996 Act to benefit consumers by making some of the strongest aspects of LEC incumbency — the local dialing, telephone numbers, operator services, directory assistance, and directory listing — **available to all competitors on an equal basis.**

Id. at ¶ 6 (emphasis added).

Although the FCC's Third Report and Order did not deal with directory covers, a number of specific findings made therein demonstrate the breadth of the obligations place upon incumbent LECs, the authority delegated to the FCC to implement local competition, and the FCC's approach to analyzing nondiscriminatory access and competitive disadvantage issues. Described below are a few of those findings:

1. The FCC reaffirmed, despite arguments to the contrary, its interpretation of the term **"nondiscriminatory access" to mean that a providing LEC must offer access equal to that which it provides to itself.** *See id.* at ¶¶ 125-130. In addition, it refused to shift the burden of proof it had established in previously-issued rules to apply to disputes about nondiscriminatory access under § 251(b)(3) and reaffirmed that the providing LEC bears the burden of demonstrating that it is permitting nondiscriminatory access and that any disparity in access is not caused by factors within the providing LEC's control. *See id.* at ¶¶ 131-135. In a consistent ruling, the FCC concluded an LEC with a directory publishing affiliate cannot treat that affiliate differently from any other directory publisher in the terms upon which it supplies customer listing information for publication, under § 222(e) of the Act. *See id.* ¶ 8.

2. Section 222(e) of the Act requires providers of local exchange services to provide to directory publishers various pieces of information about their customers, including specifically "primary advertising classifications (as such

classifications are assigned at the time of the establishment of such service) . . . that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format." 47 U. S. C. § 222(h)(3) (formerly 47 U.S.C. § 222(f)(3)). The FCC adopted the industry usage of "primary business classifications," defining it as the principal business heading under which a business subscriber chooses to be listed in the "Yellow Pages." *See* Third Report and Order ¶ 30. The FCC was called upon to decide whether a primary advertising classification fell within the statutory definition when a carrier's directory publishing affiliate, rather than the carrier itself, assigned the "Yellow Pages" heading. The FCC found that the statute did not require a carrier to provide independent directory publishers with primary advertising classifications assigned by the carrier's affiliate **unless a tariff or state requirement obligates the carrier to provide "Yellow Pages" listings as part of telephone exchange service to businesses.** *See id.* ¶¶ 29-36.

> We need not determine that we have jurisdiction over LECs' directory publishing affiliates . . . in order to require carriers to provide to requesting directory publishers primary advertising classifications in the limited circumstances described in the preceding paragraph. Instead, we conclude that **where a tariff or State requirement obligates the carrier** to provide yellow pages listings **as part of telephone exchange service** to businesses, the carrier must provide that classification to requesting directory publishers. In these circumstances, the assignment of a primary advertising classification is a necessary step in the establishment of telephone exchange service to businesses. The carrier's decision to have an affiliate or third party perform that step **does not absolve the carrier of its obligation** to provide those classifications to requesting directory publishers in accordance with section 222(e).

Id. at ¶ 35 (emphasis added).

This finding is important to our analysis of the issues in the case before us. First, it demonstrates how the FCC dealt with a challenge to its authority over a directory publishing affiliate of an LEC, an issue similar to the one raised by BAPCO in the case before us. Essentially, the FCC determined that the requirement in question applied to the telephone services provider, regardless of how that provider decides to perform its directory publishing obligation. Second, the FCC made it clear that state law can trigger additional requirements. The ruling also declared that where a particular service is required by law, state or federal, as part of the provision of telephone services, the provider is subject to other legal restrictions in how it performs that service.

3. In examining an issue related to access to adjunct features (*e.g.*, rating tables or customer information databases), the FCC found that while some such features may not be "telecommunications services" as defined in the Act, they must be supplied to competing providers **in order to allow them to use other services** specifically included in the Act (*e.g.*, operator services and directory assistance) **at a level equal to that of the providing LEC.** *See id.* at ¶ 136. The FCC also precluded LECs from negotiating exclusive contracts with third party vendors of such adjunct features that would prevent competing providers from negotiating licensing agreements with the vendors for access to their services. *See id.* at ¶¶ 137-140.

4. The FCC considered the issue of "rebranding" operator services and directory assistance services. "Call branding" was described as "the process by which an operator services or directory assistance provider identifies itself audibly and distinctly to the consumer at the beginning of a telephone call, before the consumer incurs any charge for the call." *Id.* at ¶ 9 n.24. The FCC's consideration of the issue of rebranding of operator services and directory assistance services closely resembles the TRA's consideration of the issue presented this appeal, *i.e.*, the

branding or rebranding of directory covers. *See id.* at ¶ 141. The issue before the FCC can be described as follows.

Section 251(b)(3) of the Act imposes on an incumbent LEC the duty to permit all competing providers of telephone exchange service nondiscriminatory access to, among other things, operator services and directory assistance. Thus a competing LEC may arrange for its customers to use the operator services and directory assistance services of the incumbent LEC without having to establish its own such operations. Where a competitor purchases these services from the incumbent and provides them to its customers, the question becomes whose "brand" should be used in identifying the provider of the services to the customer. May the incumbent continue to identify itself to a competitor's customer, "call branding," or must the incumbent use the competitor's name in answering calls from the competitor's customers, or "rebrand" the services? In initially considering this issue, the FCC had stated:

> **Continued use of the providing LEC's brand with a competing provider's customers clearly advantages the providing LEC.** Consistent with the requirements that we imposed on incumbent LECs in the First Report and Order, we conclude that a providing LEC's failure to comply with the reasonable, technically feasible request of a competing provider for the providing LEC to rebrand operator services in the competing provider's name, or to remove the providing LEC's brand name, **creates a presumption that the providing LEC is unlawfully restricting access to these services by competing providers.** This presumption can be rebutted by the providing LEC if it demonstrates that it lacks the capability to comply with the competing provider's request. We note also that the Illinois Commission recently ordered rebranding of operator services as those of the reseller "[t]o the extent that it is technically feasible," and **we do not preempt its intrastate**

branding requirements, nor any similar requirements that other states may have enacted.

Second Report and Order at ¶ 125 (emphasis added).

Responding to requests to reconsider this position, the FCC affirmed its rule that "a providing LEC's failure to comply with a reasonable, technically feasible request to rebrand operator or directory assistance services in the competing provider's name, or to remove the providing LEC's brand name from the service provided to the competing provider, creates a presumption that the providing LEC is unlawfully restricting access to these services." Third Report and Order at ¶ 146. Clarifying that its rule does not require the providing LEC to strip its own brand where it is not technically feasible to rebrand the services of the competing LEC, the FCC nonetheless held that where the providing LEC claims that it cannot rebrand because of the structure of its network architecture, such failure to rebrand is presumptively discriminatory[10] *See id.*

The implications of this finding are clear. Where a competitive disadvantage exists because of the practices of the incumbent LEC in how it fulfills its access obligations, the FCC will require the incumbent to change its practice. I do not perceive a significant or qualitative difference between the FCC's interpretation of the federal statute's local competition and nondiscriminatory access requirements as applied to the "branding" of directory assistance services by incumbent carriers and the TRA's interpretation of state statutory requirements regarding local competition to the "branding" of the covers of directories published, or caused to be published, by incumbents. Both agencies have required

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[10] The FCC was concerned that any other resolution would encourage incumbent LECs to arrange their architecture to achieve an anticompetitive result. *See* Third Report and Order at ¶ 146.

competitively neutral branding: either rebrand for all or brand for none, including the incumbent who is actually providing the services. The FCC's only exception, technical infeasibility, has no application to the printing of directory covers.

This FCC finding is significant in an additional way because it clearly recognizes that state regulatory agencies are not preempted by the Act or the FCC from imposing additional or more stringent requirements on telephone service providers.

B. Federal Court Interpretations

A few federal courts have considered appeals from state regulatory agency arbitration decisions to "determine whether the agreement or statement meets the requirements of section 251 of [the Act]." 47 U.S.C. § 252(e)(6). We have found no decision which deals with the issue of the content of directory covers. Some, however, deal with the definition of "network element," and some deal with the non-discriminatory access provisions found elsewhere in the Act. While the case before us does not require us to interpret or apply federal law, *i.e.*, to determine whether a directory cover is a "network element," part of "directory listing" services, or otherwise covered by the Telecommunications Act, interpretations of the Telecommunications Act are nonetheless not unrelated to the issues in this case. The federal courts' treatment of the FCC's interpretation and implementation of the local competition provisions of the Act provide guidance in our review of the TRA's interpretation of its responsibilities and authority under state statutory directives.

The following discussion of some federal court opinions in appeals from arbitrations involving interconnection agreements is intended to demonstrate that: (1) when considering issues relating to directories, whether applying § 251(c)(3)'s "network element" test or § 251(b)(3)'s directory

listing test, courts have interpreted the Act's nondiscriminatory access provisions as applying broadly; (2) courts have analyzed the nondiscriminatory access requirements of both sections by examining the competitive advantage or disadvantage of a particular practice at issue; (3) courts have interpreted the Telecommunications Act as authorizing otherwise unwarranted intrusion into operations and practices of local exchange service carriers where local competition issues are involved; and (4) courts have largely adopted, followed, or approved the FCC's approach and rulings in implementing the Act.

To begin with the majority opinion herein, the majority's conclusion that a directory cover is not a "network element" under § 251(c)(3) of the Act relies on language in *MCI Telecommunications Corp. v. GTE Northwest,* 41 F.Supp.2d at 1180-81 to the effect that a particular service may be too remote to justify inclusion as a network element and that "the unbundling requirement ordinarily should not extend to general business services that can be replicated by competitors." *GTE Northwest,* 41 F. Supp. 2d at 1181. The issue in the *GTE Northwest* case involved whether § 251(c)'s unbundling requirement applied to directory listing, billing, and collection services.

The district court recognized that the Supreme Court's decision in *Iowa Utils. Bd.* makes it clear that "operator services and directory listings, along with the software to manage billing and ordering, can be classified as a network element even though those elements are not directly utilized to provide a dial tone or carry communication traffic." *Id.* at 1180. Consequently, the district court's reference to general business services (in the language relied on by the majority) relates only to collection services. In addition, the court also stated that the unbundling requirement "is aimed at making available to CLECs those network features, which a CLEC needs to provide competitive local telephone service, that [the incumbent LEC] either has exclusive access to by virtue

of its longstanding monopoly over local telephone service, or which the competitors could not otherwise duplicate in a timely manner or at a reasonable cost." *Id.* at 1180-81. Thus, *GTE Northwest* could be read just as easily to support a finding that directories are network elements.

The Fourth Circuit has considered claims regarding access to directory publishing services in the context of obligations surrounding "network elements." In *AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc.*, 197 F.3d 663 (4th Cir. 1999), the CLEC (AT&T) asserted that it was entitled to certain directory publishing services provided by the incumbent LEC (Bell Atlantic) at cost-based rates, on the basis that they were "network elements." Reciting the Telecommunications Act's requirement that the ILEC provide "access to network elements on an unbundled basis ... on rates, terms and conditions that are just, reasonable and nondiscriminatory," 47 U.S.C. § 251(c)(3), the court used the FCC's definition of "nondiscriminatory" as meaning "access on the same terms and conditions that Bell Atlantic itself enjoys." *Id.*, 197 F.3d at 670. The court analyzed the directory services issue as follows:

> The Act says that the term "network element" "includes features ... that are provided by means of [a] facility or equipment, including subscriber numbers [and] data bases ... used in the ... provision of a telecommunications service." 47 U.S.C. § 153(29). This is a broad definition. The FCC's implementing rules provide that network elements encompass the "features, functions, and capabilities of the switch," which provide customers with "a telephone number, directory listing, dial tone, signaling, and access to 911, operator services and directory assistance." First Report and Order at ¶ 412. The Supreme Court has recognized that the Act's definition of "network element" is broad and that a network element need not be "part of the physical

> facilities and equipment used to provide local phone service." *Iowa Utils. Bd.*, 525 U.S. at ____, 119 S.Ct. at 734 (upholding FCC's determination that operator services and directory assistance are network elements).
>
> The one free listing in the white pages is indisputably a "directory listing" and therefore a network element. **It is a network element because it is a feature used in providing (through the company's facilities) telephone service.** If the basic directory listing is a network element, it stands to reason that the other directory services — additional listings and the non listing and non-publication of numbers — must also be network elements. As the SCC points out, additional white pages listings are necessary to local telephone service because many customers (spouses with different surnames, for example) require additional listings. In addition, some customers prefer non-listed or non-published numbers for reasons of privacy or security. A CLEC that had to acquire these features at tariff rates before providing them to customers would be at a competitive disadvantage in the local market. The Act's definition and the FCC's interpretation of the term "network element" are broad enough to include the additional directory services. The SCC and the district court were therefore correct to count these services as network elements that Bell Atlantic must provide to AT&T at cost-based prices.

Bell Atlantic-Virginia, 197 F.2d at 674-75 (emphasis added).

In reviewing this and other issues presented in the *Bell Atlantic-Virginia* appeal, the Fourth Circuit frequently analyzed the issue by first determining whether a competitive disadvantage existed and, if so, then determining whether the Act or the FCC's rules required elimination of that disadvantage. This approach is not unlike the TRA's analysis herein, where it determined that inclusion of the name and logo of only the incumbent LEC on the cover of the comprehensive directory did not promote competition. It

is also similar to the FCC's analysis of the "rebranding" of operator assistance services, wherein the FCC determined that "call branding" by the incumbent clearly favored the incumbent.

In an issue relevant to the question before us of whether the TRA can mandate BST to restructure its printing contract with BAPCO so as to require nondiscriminatory identification of providers on the cover of the directory, the Fourth Circuit considered whether the incumbent LEC could be required to negotiate its intellectual property licensing agreements to include use by the CLECs. The *Bell Atlantic-Virginia* court first found that the incumbent's use of hardware and software in its network which was licensed from third-party patent and copyright holders was protected by licensing agreements, while the CLEC's use was not. *See id.* at 670-71. The court then found that although the interconnection agreement granted access to the incumbent's network, it discriminated because it did not provide the CLEC equal license to use the intellectual property embedded in the network. This situation left the CLEC with the options of risking lawsuits if it used the network without a licensing agreement, attempting to negotiate for licensing when only the incumbent knew which licensing agreements might be implicated and when the lease rate paid by the CLEC already included licensing fees paid by the incumbent, or using only those network elements not subject to third party license agreements. Any of these options put the competing LEC at a competitive disadvantage and, according to the Fourth Circuit, was not nondiscriminatory under the meaning of the Act. Applying the "access on the same terms and conditions" interpretation, the court concluded that the Act required the incumbent LEC to attempt to renegotiate its existing intellectual property licenses to allow use by the CLECs. *Id.*

In considering an arbitration appeal that involved a number of local competition issues, the U.S. District Court

for Colorado applied the nondiscriminatory access requirements of § 251(b)(3) to disputes over the incumbent LEC's obligations regarding publication of directories. The court relied on the FCC's Third Report and Order (referred to as "the Directories Order" in the opinion) and found:

> In light of the Directories Order, I reject [the incumbent LEC's] contention that the directory listings provisions of the Act and FCC regulations do not require [the incumbent LEC] to act as a directory publisher for the various CLECs. It is now clear that [the incumbent LEC] does not just have to provide access to the information contained in its directories. Instead, it must actually place a customer's listing information in its directories. Directories Order, ¶ 160. **Further, it must place the listing information in its directories in a nondiscriminatory manner,** meaning that [the incumbent LEC] must place this information on terms and conditions that are equal to those provided to [the incumbent LEC's] own customers. See 47 C.F.R. § 51.217(a)(2)(i)-(ii).
>
> ***
>
> The FCC's conclusion that nondiscriminatory access applies to the actual act of placing a customer's listing information in a directory assistance database satisfied the spirit of the Act in the sense that **another of [the incumbent LECs] monopolistic advantages is eliminated and the telecommunications playing field is made more level. Indeed, as a result of the monopolistic history of the telecommunications industry, consumers are accustomed to having one phone book containing all telephone numbers.**

U.S. West Communications, Inc. v. Hix, 93 F. Supp. 2d at 1132 (emphasis added).

These cases indicate that a directory, or at least a directory listing, is part of providing telephone service. They

further indicate that the FCC and the courts will consider the competitive advantage or disadvantage inherent in an incumbent's practices in providing telephone services.

III. Directory Publishing Affiliates; Directories as Telephone Service

Before the TRA and before us, BAPCO and BST have taken the position that the TRA has no jurisdiction over BAPCO, which is characterized as a non-regulated publishing affiliate. This argument is not new and has been raised in other contexts.

In its filings, BST has stated, "Although state law grants the TRA authority to regulate certain aspects of white pages directory listings, it does not grant the TRA the general authority to regulate the publication of telephone directories. To the extent that state statutes, regulations, rules, orders, and tariffs address white pages directory listings, **BST complies with these authorities by contracting with BAPCO,** an affiliated company which is not a public utility, for the publication of white pages directory listings in telephone directories." Thus, BST has agreed that it fulfills its legal obligations to publish directories by causing the "White Pages" directory to be published by its affiliate, BAPCO. It is upon BST that the legal obligation is placed to publish a "White Pages" directory which includes listings for customers of AT&T and other competing providers of local telephone service. It is BST's obligation to so publish in accordance with all other applicable legal requirements, and none of those requirements can be avoided by contracting the actual publication out to another entity.

That conclusion comports with the reasoning expressed in the opinions of various courts and the FCC on directory affiliate issues, as set out below. Inextricably intertwined with the directory affiliate issue is the issue of whether directories are part of the provision of telephone services.

A. State Court Decisions Under State Law

The argument that a state regulatory agency has no authority over directory publishing affiliates of the local service provider has been made in various contexts across the country, even prior to the Telecommunications Act and the issues raised by its implementation. Before the court-ordered breakup of AT&T, all telephone-related services were provided by that company. As part of the divestiture, local telephone services were transferred to seven regional companies. These regional companies, at the time the divestiture order became effective, transferred, or attempted to transfer the directory publishing assets and services to related entities.

> In the AT&T divestiture case, *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, the court rejected a proposal that directory publishing assets should be transferred from the Bell operating companies such as Mountain Bell to AT&T. The court determined that the assets should remain with the operating companies, in part because profits from Yellow Pages revenues were used to subsidize rates charged to local telephone customers as a means of furthering the goal of universal telephone service. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 194. Indeed, as many as thirty states use Yellow Pages profits for this purpose. *State ex rel. Util. Comm'n v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E.2d 763, 765 (1983). When the divestiture court again addressed this issue in 1984, it observed with dismay that the intent of its 1982 order had been circumvented by the acts of regional holding companies (such as U.S. West, Inc.) transferring publishing assets from the local operating companies to unregulated subsidiaries. *United States v. Western Elec. Co., Inc.*, 592 F. Supp. at 866.

Mountain States Tel. and Tel. Co. v. Public Utils. Comm'n of Colorado, 763 P.2d 1020, 1031-32 (Colo. 1988).

Litigation ensued regarding state regulatory agency authority over directory publishing services. In *Mountain States Tel. and Tel. Co.*, 763 P.2d at 1020, the Supreme Court of Colorado affirmed the state regulatory commission's order requiring the local telephone company to reacquire directory publishing assets which it had transferred to an affiliate without prior commission approval. In that case, the court noted:

> Moreover, this case illustrates that the private business and public utility functions are not easily separated. Nor are the "essential" utility assets easily separated from the "non-essential." Historically, both the PUC and Mountain Bell considered the publishing assets to be public utilities assets. The assets were recorded in the regulated book of accounts and were depreciated according to PUC and Federal Communications Commission schedules. The depreciated assets were included in Mountain Bell's base for rate making purposes and the Yellow Pages revenues were used to subsidize rates for telephone customers. White and Yellow Pages were published as a single integrated product. A free alphanumeric listing was offered to residential customers in the White Pages and to business customers in the Yellow Pages, and a free copy of the directory was provided to all customers as part of Mountain Bell's service. The commission notes that Mountain Bell previously stipulated that directory service was "essential" to the provision of telephone service. *Corporation Comm'n v. Mountain States Tel. & Tel. Co.*, 84 N.M. 298, 502 P.2d 401 (1972), overruled on other grounds, *Matter of Rates and Charges of Mountain States Tel & Tel Co.*, 99 N.M. 1, 653 P.2d 501, 504-505 (1982). A telephone directory "has been called an indispensable element of telephone service." Annotation, Liability of Telephone Company for Mistakes in or Omissions from Its Directory, 47 A.L.R.4th 882, 897 (1986).

Id. at 1026-27.

In a recent case, the Supreme Court of Utah also determined that the directory publishing operations of an affiliate of a former Bell operating company were utility operations over which the state utility commission had authority. *See U.S. West Communications, Inc. v. Public Serv. Comm'n of Utah*, 998 P.2d 247 (Utah 2000). In that case, U.S. West had transferred its directory publishing operations to an affiliate, Dex. The state utility commission had not approved the transfer nor had it taken steps to invalidate the transfer. Instead, the commission had continued to treat the directory publishing business as part of the telephone service provider's operations for purposes of setting rates. Profits from directory publishing were applied to offset the telephone service provider's revenue requirements and thereby lower rates.

In reaching its conclusion that the directory publishing operations of the affiliate were utility operations, the court found that the ratepayers had an investment or proprietary interest in the publishing operations due to the historical union of telecommunications and directory publishing services. The court traced the reorganization of AT&T, which had, as a monopoly, "provided telephone directories in conjunction with its telecommunications services" through the transfer of the directory publishing operations from the regional holding company for telephone services (U.S. West). *Id.* at 250. Finding that the assets were utility assets, the court affirmed the commission's authority to continue to regulate the directory publishing business. *See id.* at 251-52.

> Before the transfer, these operations [directory publishing] were an integral part of telecommunications services. . . . Directory publishing inevitably increased accessibility to, and the usefulness of, telecommunications services which, in turn, increased the usage and circulation of telephone directories, making advertising therein more marketable. **Telecommunications services and directory**

> **publishing operations each helped expand and develop the other.**

Id. at 250-51 (emphasis added).

In a number of other jurisdictions,[11] state utility commissions have imputed income from a directory publishing affiliate to the telephone service affiliate in determining the telephone service provider's revenue when computing its allowable rate of return. In one case, the directory publishing affiliate argued that profits from directory publishing should not be imputed to its telephone service affiliate because the directory publisher should be free from regulation like other directory publishing companies. *See US. West Communications, Inc. v. Washington Utils. & Transp. Comm'n*, 134 Wash.2d 74, 949 P.2d 1337 (1997). The Washington Supreme Court decided otherwise, stating:

> The fact is that the Company is different from other [directory publishing] companies competing for the business. The record shows that U.S. West did not

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[11] The Washington Supreme Court also noted, "the record indicates that U.S. West, Inc. (the parent of U.S. West and of U.S. West Direct) has organized and operates U.S. West Direct as a nonregulated business in many states. Thirteen of fifteen of U.S. West's state regulatory jurisdictions impute U.S. West Direct income into telephone company operations in setting rate levels." *U.S. West Communications, Inc. v. Washington Utils. & Transp. Comm'n*, 134 Wash.2d at 99, 49 P.2d at 1350 n.8. The North Carolina Supreme Court found that more than thirty states include directory advertising revenues in ratemaking for telephone service providers, *see State Utilities Comm'n v. Southern Bell*, 307 N.C. 541, 545, 299 S.E.2d 763, 765 (1983), a statement which has been repeated by other courts in similar cases. *See U.S. West Communications, Inc. v. Public Serv. Comm'n of Utah*, 998 P.2d at 254; *Mountain States Tel. and Tel.*, 763 P.2d at 1031.

> develop this lucrative business by its initiative, skill, investment or risk-taking in a competitive market. Rather, it did so because it was the sole provider of local telephone service, and as such owned the underlying customer databases and had established business relationships with virtually all of the potential advertisers in the yellow pages. . . . The record also indicates that in contrast with potential publishing competitors, **[the directory publishing affiliate] enjoys a unique and direct benefit by being associated with the Company's regulated telecommunications services.**

U.S. West Communications, Inc. v. Washington Utils. & Transp. Comm'n, 134 Wash.2d at 99-100, 949 P.2d at 1350; *see also Mountain States Tel. & Tel. Co.,* 763 P.2d at 1027 (directory publishing business of the telephone company had been developed over the previous fifty years "within the protective shelter of" the company's monopoly over telephone service and "the public interest in those assets" is beyond dispute).

The record herein indicates that the TRA has continued to impute the profits from BAPCO's directory publishing to BST when using a rate of return method for fixing BST's rates.

In areas related to income imputation, courts have made rulings generally upholding state regulatory commission authority over affiliates of telephone companies. For example, in *General Tel. Co. of the Northwest, Inc. v. Idaho Pub. Utils. Comm'n,* 109 Idaho 942, 712 P.2d 643 (1986), the Idaho Supreme Court approved a decision by that state's utility regulatory commission limiting the rate of return which could be earned by the publishing affiliate to the same rate established for the telephone provider. *See General Tel. Co. of the Northwest, Inc.,* 109 Idaho at 950, 712 P.2d at 651.

In Pacific Northwest Bell Tel. Co. v. Katz, 121 Or. App. 48, 853 P.2d 1346 (1993), the telephone company had

requested permission from the state regulatory commission to cease producing reverse directories and business and customer lists (telephone customer information sorted by zip code, area code, etc.). The commission refused, reasoning that the telephone company merely wanted to shift production of those income-producing lists to an unregulated affiliate, which would have an adverse impact on rates charged to telephone customers. The court held that the commission had jurisdiction over these services because they were "necessary or useful" to the telephone company's performance of its duty to charge only "reasonable and just rates." *Katz,* 121 Or. App. at 52-53, 853 P.2d at 1349.

In some of these cases, the courts' specific findings about the relationship between the telephone company and the directory publisher are relevant to the case now before us. In *Rochester Tel. Corp. v. Public Serv. Comm'n of New York,* 87 N.Y.2d 17, 660 N.E.2d 1112, 637 N.Y.S.2d 333 (N.Y. Ct. App. 1995), the state utility commission reduced the telephone company's rates by imputing to it a 2% royalty from its directory publishing affiliate for the affiliate's use of the telephone company's name and logo. The commission determined that the telephone company had allowed its affiliate to use valuable intangible assets of the company (its name, reputation, and logo) without compensation and had allowed improper cost shifting from unregulated subsidiaries and affiliates to the regulated utility. Both of these actions, the commission determined, improperly resulted in higher rates for ratepayers. The reviewing court found that the commission was charged with the duty to ensure that a utility charges just and reasonable rates and may evaluate the economic consequences of a utility's actions so as to protect ratepayers from the utility's imprudent acts and upheld the commission's action, finding that the telephone company's name and reputation have value and that **the telephone company "sought to exploit these intangible assets by closely associating itself with its affiliates in various advertising campaigns."** *Rochester Tel. Corp. v. Public*

Serv. Comm'n of New York, 87 N.Y.2d at 29, 660 N.E.2d at 1117, 637 N.Y.S.2d at 338 (emphasis added). The court held, "Insofar as the ratepayers have borne the costs for creating value in [the telephone company's] name and reputation, the ratepayers are entitled to a prudent use of those assets." *Id.*[12]

In examining the propriety of the commission's blanket order regarding imputation of royalties to all utilities from dealings with the affiliates, the court noted that the circumstances involving the particular telephone company were not unique, specifically referencing the relationship between NYNEX (the directory publishing affiliate) and its local telephone service provider affiliate, New York Telephone.

> In [an opinion in other proceedings], the [state commission] found that NYNEX and its affiliates relied heavily on the reputation of New York Telephone . . . in establishing itself and that New York Telephone **"has certainly conveyed to the joint operation the good will and reputation that were developed with ratepayer funding."** Moreover, PSC noted that full page advertisements appeared in major newspapers associating NYNEX with New York Telephone and the former Bell system.

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[12] "As noted in PSC opinion . . ., ratepayers have funded the salaries, training, advertising, and other activities that generate goodwill. Ratepayers have also paid for capital investments which have contributed positively to [the telephone company's] name and reputation. Moreover, a utility is able to establish widespread name recognition because the monopoly nature of the utility industry provides a widespread, captive ratepayer base in which to instill the name recognition." *Id.*, 87 N.Y.2d at 30, 660 N.E.2d at 1117, 637 N.Y.S.2d at 338 n.2.

Id. 87 N.Y.2d at 32-33, 660 N.E.2d at 1118, 637 N.Y.S.2d at 339 (emphasis added).

A state regulatory agency's authority over a directory affiliate of a telephone service provider has been challenged in contexts totally unrelated to rates or the financial implications of the relationship. In *State Utils. Comm'n v. Southern Bell Tel. and Tel. Co.,* 326 N.C. 522, 391 S.E.2d 487 (1990), the North Carolina Supreme Court considered that state's regulatory agency's authority to hear complaints of inaccurate directory listings in a "Yellow Pages" directory. In that case, the directory publishing affiliate, BAPCO, maintained that the agency had no jurisdiction to hear complaints against it because the statutes provided only for complaints against a public utility and that BAPCO was not a public utility.

The court noted that it had considered a similar argument regarding the restrictive definition of public utility function in *State ex rel. Utils. Comm'n v. Southern Bell,* 307 N.C. 541, 299 S.E.2d 763 (1983), a case involving whether the commission could include profits from "Yellow Pages" advertising for purposes of ratemaking. The court, in holding that the telephone company's utility function was to provide adequate service to its subscribers, stated that "[to] suggest that the mere transmission of messages across telephone lines is adequate telephone service is ludicrous." *Southern Bell,* 307 N.C. at 544, 299 S.E.2d at 765.

The court recognized that the telephone company was required by tariff to publish a directory and held that a telephone company's decision to include "Yellow Pages" advertising in its directory makes correct listings in its advertisements a part of the utility's function of providing adequate service.

> While Southern Bell, the regulated public utility, is the entity which is required by tariff to publish the telephone directory, it has contracted with BAPCO to take over this

> duty and publish the directory. As noted earlier, BAPCO contends that it is not subject to the complaint jurisdiction of the Commission because BAPCO is not a "public utility" as defined by the statute. We have already concluded that **publishing the directory, which must include proper telephone listings in both the white pages and the yellow pages, is a utility function** which comes under the jurisdiction of the Commission. Since publishing the directory with correct listings is a public utility function, and since BAPCO is performing this function for Southern Bell, the Commission has jurisdiction over BAPCO to handle any complaints which arise from BAPCO's performance of this function without regard to whether BAPCO itself is a public utility. . . .
>
> The real issue in this case is whether the Commission has complaint jurisdiction over a company publishing, on behalf of a regulated telephone utility, a telephone directory which also contains paid advertising. Without deciding whether the Commission has general regulatory jurisdiction over yellow pages advertising, we conclude that the Commission has jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory **even when the regulated utility has delegated to another company the public utility function of publishing its directory** which also includes paid advertising. Providing a correct telephone listing is part of providing "reasonably adequate service" as required by N.C.G.S. § 62-42(a)(5).

Id., 391 S.E.2d at 491 (emphasis added).

B. Decisions Under the Telecommunications Act of 1996

At least with regard to "directory listings," the FCC has unequivocally answered the question of its authority to apply the Act's requirements to directories published by affiliates

of the local services provider. *See* 47 C.F.R. § 51.5 (directory listing includes information that the carrier or an affiliate has published or caused to be published); FCC Third Report and Order ¶¶ 29-36. (*See* Section IIIC, *infra.*)

Similarly, federal courts addressing the application of the requirements of the Telecommunications Act of 1996 or the FCC's rules implementing the Act to directory publishing affiliates have generally focused on the obligations placed on the telephone service provider. In *U.S. West Communications, Inc. v. Hix*, 93 F.Supp.2d at 1115, the court determined that the incumbent local exchange carrier could be required to include competing carriers' customers on a nondiscriminatory basis in directories or directory listings published by the incumbent carrier or its affiliate. In that case, the incumbent local exchange carrier argued that the state regulatory commission had no authority to impose conditions on a directory-publishing affiliate because that entity was not a telecommunications carrier subject to regulation and because publishing is a deregulated service. The court flatly rejected that argument, upholding the FCC's interpretation that the Act's nondiscriminatory access requirements applied to directories that the telephone company or an affiliate published or caused to be published as provided in 47 C.F.R. § 51.5. *See id.* at 1133.

The court in *Hix* specifically declined to follow cases holding that a state commission lacked authority to impose directory listing requirements on a directory publishing affiliate of the ILEC, on the basis those decisions were issued prior to the FCC Third Report and Order and/or failed to consider the obligations of § 251(b). *See id.* at 1133-34. The court, instead, followed MCI *Telecommunications Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp.2d 768 (E.D. Mich. 1999).

In *Michigan Bell*, the court amended its previously entered order which had held that the incumbent local exchange carrier (Ameritech) was not required to list a

competing carrier's (MCI) customers in its "Yellow Pages." The court amended the earlier order because of the FCC's clarification of nondiscriminatory access requirements of the Telecommunications Act regarding directory services, as reflected in the Third Report and Order released in September 1999.[13]

> Ameritech [the incumbent LEC] further argues that it cannot be required to publish MCI's [the CLEC] customers in its yellow pages because Ameritech does not publish a yellow pages directory. The Ameritech Pages Plus Yellow Pages, which lists Ameritech's business customers, are published by a separate company called Ameritech Publishing, Inc., also known as Ameritech Advertising Services. Ameritech points out that paragraph 158 of the Directories Order provides that "a LEC publishing a telephone directory has a duty to incorporate a listing supplied by its competitor," Further, Ameritech relies on *U.S. West Communications, Inc. v. Garvey,* No. 98-1295 (D. Minn. Mar. 30, 1999) (JA 70), which held that the state commission had no authority to regulate the publisher of a phone directory, which was a wholly owned subsidiary of the ILEC, where there was no evidence that ILEC controlled the publisher. Ameritech reasons that because it does not publish a yellow pages directory, it has no duty to publish MCI's listings in such a directory.

MCI Telecommunications Corp. v. Michigan Bell Tel. Co., 79 F.Supp.2d at 801.

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[13] The court stated, "At the time it issued its Opinion, the Court was not aware that the FCC had just clarified the meaning of 'directory listing' in section 251(b)(3)." *Michigan Bell,* 79 F.Supp.2d at 800-01.

Finding this argument "specious," the court relied on the FCC's interpretation and clarification in its Third Report and Order and held that "the duty to publish competitors' business customers in a yellow pages directory on a nondiscriminatory basis extends to incumbent carriers who have caused their own customer listings to be published in a yellow pages directory." *Id.* In response to the argument that the directory publisher was an independent company which provided directory listings by contract to Ameritech and to other carriers and thus was not an affiliate governed by the Telecommunications Act and its regulations, the court found there was evidence to the contrary.[14]

> Moreover, the issue of whether Ameritech Publishing is an affiliate of Ameritech is not relevant because the regulation is drafted more broadly. "Directory listings" include those that an incumbent carrier has "caused to be published." 47 C.F.R. § 51.5. Ameritech causes its own customers to be published in the Ameritech Pages Plus Yellow Pages. Therefore, Ameritech has the duty to provide nondiscriminatory access to such yellow pages publication to MCI's customers.

Id. at 802.

Finally, in a recent case, the Colorado Supreme Court considered a similar argument in a case under a new state law providing for local competition. *See U.S. West*

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[14] Particularly significant was the fact that the Interconnection Agreement provided that "Ameritech shall cause the Publisher to include Primary Customer Listings of MCI's Customers in its White Pages Directories. . . ." Thus, the court found that the telephone company, Ameritech, exercised some control over the publisher, because it agreed to cause Ameritech Publishing to publish both its own customers and MCI's customers in the "White Pages" directory. *Id.* at 802.

Communications, Inc. v. Colorado Pub. Utils. Comm'n, 978 P.2d 671 (Colo. 1999). The incumbent LEC, U.S.W.C., contended that new rules adopted by the state utilities commission requiring the incumbent to offer premium listing services to customers of competitors impermissibly interfered with the existing directory publishing contract between U.S.W.C. and its affiliate, Direct. The court found that U.S.W.C. did not demonstrate how the rules affected the existing contract or explain why it could not enter into another contract to provide services in compliance with the rules. Again, the telephone company made the argument that because it did not publish "White Pages" directories the state commission could not impose on it the requirement to negotiate contracts to provide the required services on behalf of the CLECs. The court found that the rules did not impose any obligation on U.S.W.C. to negotiate, but simply imposed the obligation to offer the features to its competitors. Finding the incumbent's argument unpersuasive, the court stated:

> Regardless of the exact nature of USWC's contract with Direct,[15] a **regulated monopoly may not evade regulatory requirements simply by contracting** a service with a non-regulated third-party and then

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[15] In a footnote, the court recounted the history of the commission's actions regarding the transfer of directory publishing assets from the telephone company subsidiary of U.S. West, Inc. to its directory publishing subsidiary, U.S. West Direct, Inc. The commission eventually rescinded its order requiring the telephone company to reacquire those assets and required the publishing affiliate to make annual equity infusions to the telephone company. As part of the settlement which resulted in that order, the directory publishing affiliate agreed to fulfill the telephone company's obligations to publish and distribute directories under existing rules. *See id.*, 978 P.2d at 677 n. 11.

> claiming that future rules concerning the service are invalid if they interfere with the contract.

Id. at 677 (emphasis added).

C. The Relationship Between BAPCO and BST

As the previous discussion demonstrates, a number of courts have recognized the historical connection between the providing of equipment and dial tone and the providing of directories, all as part of telephone services, as well as the continuing corporate relationships. There is a general recognition that telecommunications services and directory publishing operations have each helped expand and develop the other. *See U.S. West Communications, Inc. v. Public Service Comm'n of Utah,* 998 P.2d at 251. Similarly, courts have recognized that the directory publishing affiliate of the incumbent local telephone company enjoys a unique and direct benefit by being associated with the company's regulated telecommunications services. *See U.S. West Communications, Inc., v. Washington Utils. & Transp. Comm'n,* 134 Wash. 2d at 99, 949 P.2d at 1350. Directory publishing affiliates have generally relied on the reputation of the telephone company, and in many situations, the telephone company and the publishing affiliate have jointly advertised and sought to use the good will and reputation that were developed by the telephone company within the protection of a monopoly. *See Rochester Tel. Corp. v. Public Serv. Comm'n of New York,* 87 N.Y.2d at 33, 660 N.E.2d at 1118, 637 N.Y.S.2d at 339.

The record before the TRA confirms a similar relationship among BAPCO, BST, and their mutual parent, BellSouth Corporation. Included in the record are the financial statement, prospectus, shareholder report, and related documents for BellSouth Corporation. In the prospectus, the following description of the corporation's activities is included:

> BellSouth Corporation, with more than 22 million access lines in nine Southern states, provides local telephone service and long distance access to more customers than any other company in the U. S. We market a full array of telecommunications services to businesses and consumers, . . . BellSouth is one of the world's largest wireless communications companies, serving more than 4.8 million cellular customers in major markets throughout the U.S. and in 12 other countries. BellSouth leads the industry in Yellow Pages advertising and directory publishing.

In its 1996 SEC annual report, BellSouth Corporation reported:

> BellSouth Corporation (BellSouth) is a holding company providing telecommunications services, systems and products primarily through two wholly-owned subsidiaries, BellSouth Telecommunications, Inc. (BellSouth Telecommunications) and BellSouth Enterprises, Inc. (BellSouth Enterprises). BellSouth Telecommunications provides predominantly tariffed wireline telecommunications services to approximately two-thirds of the population and one-half of the territory within Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. BellSouth's other businesses (predominantly wireless and international communications services and advertising and publishing products) are conducted primarily through subsidiaries of BellSouth Enterprises.

Under a heading "Other Telecommunications Business Operations," BellSouth included information regarding directory advertising and publishing:

> BellSouth Enterprises owns a group of companies which publish, print and sell advertising in, and perform related services concerning, alphabetical and classified telephone directories. Directory advertising and publishing

> revenues represented approximately 9% of BellSouth's total operating revenues for each of the last three years. Two of BellSouth's directory companies also provide publishing and related products and services to other directory publishers. During 1996, such BellSouth companies published approximately 500 directories for BellSouth Telecommunications and contracted with approximately 170 nonaffiliated companies to sell advertising space in approximately 490 of their publications.

In its shareholder report, BellSouth's management addressed its plans for succeeding in the competitive environment created by the Telecommunications Act. Among other things, BellSouth stated, "Being the single source to provide our customers' many telecommunications needs is a key ingredient for success as the dynamics of our marketplace change." Playing a large role in BellSouth's plans was the use of the BellSouth name: "Leveraging the power of our BellSouth brand is a key element of our determination to win." It is clear that BellSouth considered branding and brand identification important to its success in all its endeavors. "The BellSouth brand stands for convenience, reliability and value. We are aggressively communicating that message to customers in the South with a wide variety of innovative advertising campaigns, marketing programs and sports sponsorships."

It is apparent that BellSouth Corporation, the parent of both BST and BAPCO, intended that both subsidiaries benefit from use of the BellSouth name, including its logo. That name earned its value through providing telephone services.

Following the example of the authorities discussed above, and based on proof in this record of a similar relationship between the entities, I conclude that the TRA's authority over BAPCO is irrelevant because the TRA has authority over the incumbent local telephone company, BST,

the entity upon which the law places the obligation to produce a directory that includes the customers of its telephone service provider competitors. Therefore, the real question is the extent of the TRA's authority over BST.

IV. Our Review of TRA Interpretation

A. The Arbitration Proceedings

AT&T and BST participated in arbitration proceedings before the TRA regarding open issues in their interconnection agreement. My colleagues place significance, to differing degrees, on the TRA's declination to determine, in the context of the arbitration, the issue of placement of AT&T's name and logo on the cover of the directory produced by BAPCO for its affiliate BST. All parties herein agree that this issue was presented in that arbitration. However, there is nothing in the record before us to support the implication that the TRA decided the issue was not arbitrable because directory covers are not "network elements," a conclusion apparently reached by the majority, perhaps on the basis of statements in BST's brief that "the TRA ... ruled that the directory cover issue was not arbitrable under the Federal Act" and "[i]mplicit in this ruling was the determination that a directory cover is not a 'network element' meaning 'a facility or equipment used in the provision of telecommunication service.'"[16]

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[16] BST also stated that the TRA's ruling in the arbitration proceeding was consistent with the rulings of other states and offered a footnote stating that "a majority of regulatory authorities similarly have held that the directory cover issue is not an arbitrable dispute under the Federal Act. These decisions are largely based on agency determinations that BAPCO is not an 'incumbent local exchange company' ('ILEC') or a 'local exchange company' ('LEC') providing local exchange telecommunication services, but a private company providing (cont'd)

From brief references during the hearing in this matter, the only conclusion I can draw regarding the arbitration proceeding is that the TRA determined that the issue was better left to negotiation.[17] Even BST in its brief states that

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(... cont'd)

telephone directories and directory publication services in a competitive market." In view of the FCC's Third Report and Order, as well as federal court decisions following it, any such determination that the nondiscriminatory access provisions do not apply to directories published by an affiliate in performance of the telephone service provider's legal responsibility would no longer be a correct interpretation of the Telecommunications Act. In any event, the TRA's ruling in the case before us would imply that it had not declined to arbitrate the issue of directory covers on the basis of BAPCO's affiliate status.

[17] In its brief, the TRA describes what happened as follows:

> In that docket, AT&T sought to have the arbitrators rule on the issue under the Federal Telecommunications Act of 1996 as part of its Order and Award in the arbitration proceeding. BST and BAPCO opposed consideration of this issue during the arbitration. All parties addressed the issue before the arbitrators in oral arguments. Subsequently, BAPCO filed a petition for a declaratory ruling in the arbitration proceeding, in which it requested that the arbitrators find that neither BAPCO nor the issues raised by AT&T in the arbitration proceeding that related to telephone directories were subject to the TRA's jurisdiction or to the arbitration provisions of 47 U.S.C. § 252. In response, AT&T filed a motion to dismiss BAPCO's petition. BST supported BAPCO's prayer for relief in its response to AT&T's motion lo dismiss. All parties supplemented their filings with orders and transcripts from arbitration proceedings before other state commissions within the BST service territory. After careful consideration of the record concerning this issue, the arbitrators ruled that the issue would not be addressed within the context of the arbitration proceeding and dismissed both BAPCO's petition and
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> (cont'd)

the TRA stated "[t]hat private negotiations are the preferred method of resolving this issue, and the parties are encouraged to resolve this matter through negotiation." All parties agree that the content of the cover of the directory was not included in the arbitration under the 1996 Telecommunications Act, and I believe we can imply nothing more from its exclusion.

Again, whether the TRA's refusal to arbitrate that issue was proper under the provisions of the Telecommunications Act is not before us. *See* 47 U.S.C. § 252(e)(6). Also not before us is the question of whether directory covers are "network elements" under the Act. Even if we found they are not, such a finding would only lead to the conclusion that the Act, or at least one provision of it, did not provide authority to the TRA for its order.

B. Independent State Law Basis

As thoroughly discussed in *BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663 (Tenn. Ct. App. 1997), the 1996 Telecommunications Act does not preempt state regulation as long as that regulation is not inconsistent with the Act or FCC implementation of the Act. *See Greer* at 671-72. "Congress plainly did not desire to displace local telecommunications regulation when it enacted the Telecommunications Act of 1996. The Act itself makes it clear that state commissions play a pivotal role in implementing telecommunications policy." *Id.* at 672.

In fact, "[w]ith specific reference to the interconnection issue, the Act also states that it should not be construed to prohibit state commissions from enforcing or promulgating

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AT&T's motion to dismiss. Thereafter, AT&T and BAPCO engaged in negotiations, however, no agreement was reached as to this issue of whether AT&T's name and logo should be placed on the cover of BST directories.

regulations or from imposing additional requirements that 'are necessary to further competition in the provision of telephone exchange service or exchange access' as long as they are 'not inconsistent' with the Act." *Id.* at 671-72 (citing 47 U.S.C.A. § 261(b), (c)); *see also* 47 U.S.C. § 251(d)(3) (directing the FCC not to promulgate regulations that prevent state commissions from enforcing local policies that establish access and interconnection requirements, are consistent with the Act's requirements, and do not substantially prevent the implementation of § 251 of the Act).

No party has alleged that the TRA's interpretation of its rule conflicts with the Telecommunications Act. At most, the argument is that the TRA's interpretation is not mandated by the Telecommunications Act. Even if it were so mandated, the question before us is whether state law provides an independent basis for the interpretation. *See U.S. West Communications, Inc. v. Colorado Pub. Utils. Comm'n,* 978 P.2d at 673 n.4 (noting that the Telecommunications Act had become effective during the rulemaking proceedings for the state agency rules being challenged and that no party had argued preemption by the federal act, the court would not consider whether the federal statute provided an independent justification for the rules).

In *AT&T v. Iowa Utils. Bd.,* the U.S. Supreme Court addressed the Telecommunications Act's effect on state regulatory authority, finding:

> . . . Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control. Insofar as Congress has remained silent, however, § 152(b)[18] continues to

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[18] The Court refers to 47 U.S.C. §152(b) which reads in part, "Except as provided in [specific provisions] . . . nothing in this chapter shall be construed to apply or to give the Commission (cont'd)

> function. The Commission could not, for example, regulate any aspect of intrastate communication not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.

525 U.S. at 381 n. 8, 119 S.Ct. at 731 n. 8.

In its policies and regulations, the FCC has acknowledged the ability of states to go beyond the terms of the Telecommunications Act in their regulation of companies which provide telephone services. For example, in its Third Report and Order, the FCC gave effect to a state requirement that a local exchange carrier provide a "YellowPages" listing as part of its service to businesses. *See* FCC Third Report and Order ¶¶ 32-35. Similarly, in discussing non-discriminatory access to certain features in directories, the FCC stated, "Our rules do not require incumbent LECs to provide competitors with access to the customer guides and information pages that appear in the LECs' printed telephone directories, but neither do these rules preclude States from establishing such a requirement, to the extent they have such authority." *Id.* ¶ 163. The FCC also noted that it had adopted certain definitional requirements for directory listings to accommodate States that may require more stringent requirements as part of nondiscriminatory access to directory listings." *Id.* After giving examples of potential requirements by states, the FCC concluded that "to the extent that a providing LEC is required to list such information in its directory assistance database, the providing LEC must grant a requesting LEC nondiscriminatory access to such

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(... cont'd)

jurisdiction with respect to... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."

information." *Id.* Finally, in its ruling regarding the rebranding of operator services, the FCC specifically stated that "we do not preempt [another state's] intrastate branding requirements, nor any similar requirements that other states may have enacted." Second Report and Order at ¶ 125.

Therefore, the federal Act neither establishes nor limits the TRA's authority to regulate pursuant to state law. The question is whether the TRA's interpretation and application of its existing rule is within its authority under state law.

C. Review Under State Law

In this action, the TRA was asked to issue a declaratory order interpreting its rule and applying that rule to a particular set of facts. *See* Tenn. Code Ann. §§ 4-5-223 and 4-5-224; *see also* Tenn. Code Ann. § 65-2-104. Pursuant to the Administrative Procedures Act, the TRA convened a contested case hearing on the petition. *See* Tenn. Code Ann. § 4-5-223. The standard for reviewing administrative agency decisions in contested case hearings under the APA is set out in Tenn. Code Ann. § 4-5-322. This court has applied that standard to agency declaratory orders. *See Ogrodowczyk v. Tennessee Bd. For Licensing Health Care Facilities,* 886 S.W.2d 246 (Tenn. Ct. App. 1994). That standard has been summarized as follows:

> This is not a broad, *de novo* review; it is restricted to the record; and the agency finding may not be reversed or modified, unless arbitrary or capricious, or characterized by abuse, or clearly unwarranted exercise of discretion, and must stand if supported by substantial and material evidence. T.C.A. § 4-5-322(h)(5), *C.F. Indus. v. Tennessee Pub. Svc. Comm.,* Tenn. 1980, 599 S.W.2d 536.

Id. at 250-51.

Tenn. Code Ann. § 4-5-322 allows a reviewing court to reverse or modify the agency's decision if the rights of the

petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are "in excess of the statutory authority of the agency." Tenn. Code Ann. § 4-5-322(h)(2). That ground forms the basis for the majority opinion herein.

Our Supreme Court has described the general authority of a state agency, stating:

> Every action taken by an agency must be grounded in an express statutory grant of authority or must arise by necessary implication from an express statutory grant of authority. Even though statutes such as the Solid Waste Disposal Act should be construed liberally since they are remedial in nature, the authority they vest in an administrative agency must have its source in the language of the statutes themselves.

Sanifill of Tennessee Inc., v. Tennessee Solid Waste Disposal Control Bd., 907 S.W.2d 807, 810 (Tenn. 1995) (citations omitted).

In determining whether the TRA's interpretation is within its statutory authority, we must review the relevant statutes. In doing so, we are guided by familiar principles of statutory construction.

> The role of this Court in construing statutes is to ascertain and give effect to legislative intent. Whenever possible, legislative intent is to be ascertained from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. . . . Instead, we must apply a reasonable construction in light of the purposes and objectives of the statutory provision. Finally, a state agency's interpretation of a statute that the agency is charged to enforce is entitled to great weight in determining legislative intent.

Greer, 967 S.W.2d at 761 (citations omitted).

The statutory grant of authority over public utilities given to the TRA is extensive:

> The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter.

Tenn. Code Ann. § 65-4-104.

The legislature has also specifically directed how we should interpret the TRA's authority:

> This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3, and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

Tenn. Code Ann. § 65-4-106. Our Supreme Court has recognized the explicit mandate of this provision and interpreted it as a signal of the General Assembly's "clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." *Consumer Advocate Div. v. Greer,* 967 S.W. 2d at 762 (quoting *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n,* 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992)).

In addition, the TRA has specific authority or power to "fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility," Tenn. Code Ann. § 65-4-117(3), and to require every public utility to "furnish safe, adequate, and proper service." Tenn. Code Ann. § 65-4-114(l).

As the majority noted, the state undertook a statutory change in the regulation of telephone services in 1995. Included in the preamble of the bill is the statement that "[c]ompetition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each." In addition, the expressed goal of the new statute was:

> to foster the development of an efficient technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. §65-4-123.

The State legislation also imposed certain requirements on providers of telephone services:

> All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and **all telecommunications services providers shall,** to the extent that it is technically and financially feasible, **be provided desired features, functions and services** promptly, and on an unbundled and **non-discriminatory** basis from all other telecommunications services providers.

Tenn. Code Ann. § 65-4-124(a). (emphasis added.)

The statute also required all telecommunications services providers who provide basic local exchange service to "provide each customer a basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c).

D. Application to TRA's Order

The TRA has "practically plenary authority over the utilities within its jurisdiction," and there can be no dispute that BST is a utility within the TRA's jurisdiction. The TRA has specific statutory authority to "fix just and reasonable" standards or practices to be followed by a utility and to require a utility to provide "adequate and proper" service. *Greer,* 967 S.W.2d at 761-62; Tenn. Code Ann. §§ 65-4-114(l), 117(3). In order to be able to compete in providing long distance telephone service, BST is required by law to publish a "White Pages" directory which includes the customers of its local service competitors. It is required by law to provide services to its competitors on a nondiscriminatory basis. In order for the TRA to "effectively govern and control the public utilities placed under its jurisdiction," it must necessarily have authority to regulate how a utility complies with its legally-imposed obligations and to ensure such compliance. Thus, TRA clearly has jurisdiction over BST's publication of its "White Pages" directory.

I find no support for singling out one particular element or part of the publication of the directory and subjecting only that element to a jurisdictional analysis, as the majority implies by its finding that the branding of the directory cover is not an essential public service. Nothing in the statutes giving TRA authority over public utilities and their services and practices remotely implies that authority over every separate step in the provision of utility services must be found in separate statutory language. Having given the TRA "almost plenary" jurisdiction over utilities and their practices, the legislature was not required to list in every detail the specific services or practices the TRA could regulate. Given

the broad grant of authority a utility would need to demonstrate that the service being regulated was not part of the company's utility function. That is impossible in this case since the service herein, publication of a "White Pages" directory, is required by law to be provided as part of the provision of telephone services. In fact, the TRA has found the "White Pages" directory to be part of the basic services which a local service provider must provide.

It is clear from the earlier discussion of numerous authorities that most jurisdictions have determined that publication of the directory is part of telephone service or, even, part of adequate telephone service. The federal Telecommunications Act of 1996 includes specific requirements for directory publishing and for directory assistance and directory listings, and the FCC has established rules and policies implementing those provisions of the Act. The Tennessee General Assembly has also inserted a requirement that telephone companies provide "White Pages" directory listings for their customers.

This court has indirectly addressed the issue of whether "White Pages" directories are part of the telephone company's utility function. In *Smith v. Southern Bell Tel. and Tel. Co.*, 51 Tenn. App. 146, 364 S.W.2d 952 (1962), this court examined whether a telephone company was acting "in the capacity of a public utility" when selling and publishing classified advertisements in the "Yellow Pages" portion of the telephone directory such that the company could not contractually limit its liability to purchasers of such advertising. While quoting with approval opinions from other states generally indicating that selling and publishing advertisements was outside the scope of the public service or public utility functions, the opinion clearly indicated that "White Pages" listings and publication of "White Pages" directories, on the other hand, were part of the public utility functions of the telephone company:

> It may be that a telephone company could not lawfully contract to limit its liability with respect to the actual listing of the name of its subscriber or patron in the alphabetical list of subscribers, together with the correct street address and telephone number, since it is a matter of common knowledge that **telephone companies, in order to increase their business as a public service corporation, or public utility, acting in the capacity as a telephone company, which throughout the years has published the name, street address and the telephone number of its subscribers in a directory** and which service is paid for in the regular rate, charged for the same . . . .

Smith, 51 Tenn. at 153-54, 364 S.W.2d at 956 (emphasis added).

The *Smith* case specifically did not deal with the authority of the Public Service Commission and, in fact, noted that the PSC "has never exercised any control whatever over the right of a telephone company rendering this advertising service which will be referred to as 'Yellow Pages'" in the telephone directory, and there are no limitations upon such activity whatever." *Id.*, 51 Tenn. at 159, 364 S.W.2d at 958. However, it clearly indicates that publication of directories is part of the utility's provision of telephone services, which, therefore, would have been subject to regulation by the TRA.

From all of the above, I conclude that the TRA clearly has authority to regulate BST's publication of "White Pages" directories (1) because it can regulate the utility, BST; (2) because it can fix just and reasonable practices which BST must follow; (3) because publication of a "White Pages" directory is part of the regulated and required provision of local telephone services; and (4) because it can enforce the state statutory nondiscriminatory provision of services requirement with regard to a mandated service. Further, that authority extends to prescribing the contents of the directory

and of the cover. In fact the regulation at the center of this dispute is entitled "Directories Alphabetical Listing (White Pages)" and includes a number of requirements regarding the content of directories and their covers. For example, the cover must show the area included in the directory and the month and year it was issued. *See* TRA Rule 1220-4-2-.15(3). Further, the rule requires that information regarding emergency (such as police and fire) calls appear conspicuously in the front part of the directory. *See id.* No one has disputed, or reasonably could dispute, the TRA's authority to establish such requirements. In fact no one has actually challenged that portion of the rule requiring that the name of the telephone utility appear on the front cover. The majority does not find the rule itself to be beyond the authority of the TRA.[19] What is in dispute is the TRA's interpretation of its existing rule in light of its understanding of the directives given to it by the General Assembly.

Obviously, even though the TRA has authority to regulate the publication of the directory, it must exercise that authority in accordance with legislative limitations, directives and policy. Stated another way, "its actions must be harmonious and consistent with its statutory authority." *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv.*

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[19] BST asserts that the "reference [in the rule] to 'the telephone utility' in subsection (3) can only be to the telephone utility (*e.g.*, BST) which assumed responsibility for the regular publication of white pages telephone directories . . ." Neither the TRA nor this court has approved this interpretation. The TRA specifically found that the "telephone utility" referred to all providers whose customers are included in the directory. Since the majority opinion did not invalidate the rule itself, BST is faced with the dilemma of complying with the rule with no direction from this court even though the majority has vacated the TRA's interpretation.

Comm'n, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992). The General Assembly intended to leave implementation of its broad policies to the technical competence and specialized knowledge of the TRA, and limited its ability to regulate the practices of utilities only by requiring that such practices or standards be "just and reasonable." Tenn. Code Ann § 65-4-117(3). Because of similar language giving broad authority to the PSC (now TRA) to set rates that are "just and reasonable," and in the absence of any other requirement as to the approach to be followed by the Commission, our Supreme Court has characterized ratemaking as "a value judgment made by the Commission in the exercise of its sound regulatory judgment and discretion." *C.F. Indus. v. Tennessee Pub. Serv. Comm'n,* 599 S.W.2d 536, 542 (Tenn. 1980). Consistent reasoning would require us to consider the TRA's setting of just and reasonable practices a similar value judgment resting in its discretion.

With specific regard to the local competition provisions of the 1995 state act, the legislature intended that the statute be implemented such that competition among providers was fair and that regulation be applied impartially. *See* 1995 Tenn. Pub. Acts, ch. 408. It specifically directed that regulation of services and/or providers 'shall protect the interests of consumers without unreasonable prejudice or disadvantage" to any provider. Tenn. Code Ann § 65-4-123. It also directed that all providers receive desired services on a nondiscriminatory basis. *See* Tenn. Code Ann. § 65-4-124. By giving the TRA these general guidelines, the General Assembly intended that the TRA exercise its specialized knowledge of the telephone services industry in regulating the move to local competition., Thus, the TRA was given broad authority to interpret whether a particular practice was reasonable and just, protected the interests of consumers, and did not unreasonably disadvantage a provider.

In our review of the TRA's order, we must give particular deference to the agency's expertise where the legislature has

given the agency broad authority to implement policy goals. The U. S. Supreme Court, in *AT&T v. Iowa Utils. Bd.*, applied such deference, when it stated that the question of whether the FCC's approach would impede negotiations toward interconnection agreements "a matter eminently within the expertise of the Commission and eminently beyond our ken." *Iowa Utils. Bd.*, 525 U.S. at 394-96,119 S.Ct. at 737-38. Similarly, the Court of Appeals of New York deferred to the state utility commission's expertise when stating that the question of whether a given affiliate contract is contrary to the public interest is a matter presenting "technical problems which have been left by the legislature to the expertise of the PSC." *New York Tel. Co. v. Public Serv. Comm'n of New York*, 72 N.Y.2d 419, 429, 530 N.E.2d 843, 849, 534 N.Y.S.2d 136, 141 (N.Y. Ct. App. 1988).

One other state court has recently reviewed a state regulatory agency's implementation of a new state statute mandating competition in local telephone service. *See U.S. West Communications, Inc. v. Colorado Pub. Utils. Comm'n*, 978 P.2d at 675. The Colorado utilities commission had promulgated rules regarding the publication of a single "White Pages" directory by the existing telephone service provider in each local area which included customer information for all telephone customers in the area, regardless of which LEC provided that customer's telephone services. In addition, the commission had required the incumbent LEC to offer premium listings to customers of its competitors and to include customer guide pages for each of its competitors which would include information on how to reach the competitor for repair services, billing information, and related information. The commission, and subsequently the court, based its actions on the legislative direction found in Colorado's 1995 telecommunications deregulation act. That act, among other things, adopted a state policy "to encourage competition in this market and strive to ensure that all consumers benefit from such increased competition." *Id.*

at 674. The legislation also directed that "all barriers to entry into the provision of telecommunications services in Colorado be removed as soon as practicable." *Id.*

The Supreme Court of Colorado determined that the commission had acted within its authority, finding that "to the extent that the denial of equal access to premium listings or guide pages constitutes a barrier to entry, the PUC had the authority to promulgate regulations addressing the issue." *Id.* at 675.

> In this regard, we note that some deference to administrative expertise is appropriate where regulations are based on "'judgmental or predictive facts,' which are primarily founded on policy choices rather than factual determinations and which are not capable of definitive proof." Hence, we defer to the PUC's administrative expertise in its predictive finding that access to guide pages and premium listings would eliminate a barrier to entry into the market by CLEC's.

Id. (citations omitted). In making this conclusion, the court relied upon *Federal Communications Comm'n. v. National Citizens Comm.*, 436 U.S. 775, 98 S.Ct. 2096 (1978) (upholding regulations of the FCC in requiring mass media divestiture to support diversity in information viewpoints even though the record failed to conclusively support the FCC's prediction that ownership diversity would result in information diversity).

To apply these principles to the TRA's order, we must examine the specific findings therein as well as the specific legislative directives. First, the TRA found, consistent with statutory language, that it was charged with the duty of promoting telecommunications competition and with the duties of protecting the interests of both the consumers and the utility providers. The TRA adopted a finding that "the

white pages listing is a basic service[20] and an essential tool the customer needs to efficiently and fairly use the network." The TRA also determined that one comprehensive directory served the interest of consumers by reducing customer confusion and also promoted competition.

Regarding Rule 1220-4-2-.15, after acknowledging that the rule was adopted when there was only one provider of local telephone service, the TRA found that the "plain language of the rule envisions the name and utility whose customers are inside the directory. Following the same logic, . . . if more than one utility's customers are inside the directory, then more than one utility's name would be on the cover." One commissioner noted that the TRA did not have the authority to allow a telephone book with no provider's name on the cover.

Recognizing that it must implement state telecommunications statutes in terms of the stated policy to permit competition in the interest of consumers, the TRA found that listing all providers' names on the cover of the directory would meet both policy goals, stating:

> . . . the names of local providers on the cover would be helpful to consumers. This would not only serve as information, but would also promote competition by showing consumers they have a choice in service providers. This method also allows small companies to

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[20] "Basic local exchange services" are defined in Tenn. Code Ann § 65-5-208 and include those services generally understood as basic telephone services. They are required, at a minimum, to be provided at the same level of quality as those being provided as of the effective date of the 1995 state telecommunications act. Among other things, basic services are subject to different pricing controls than non-basic services under the new price regulation form of rate setting. *See* Tenn. Code Ann § 65-5-209.

> continue to provide service without the financial burden of having to produce their own directory. They may contract with another carrier or publisher to satisfy their TRA Rule requirements and still have their name on the cover of the directory.

The TRA then concluded that the included carrier should have its name on the directory cover in "like format." If BST includes its name (which it is required to do) on the cover, then it must also include the name of its competitors who provide local telephone service in the area "in like format" or "under the same terms and conditions."

BST is required by Tenn. Code Ann. § 65-4-124(a) to provide to AT&T and all other competing providers features, functions, and services on a nondiscriminatory basis. The FCC and federal courts have interpreted the similar "nondiscriminatory access" requirement of the Telecommunications Act to mean on the same basis as the incumbent provides the service to itself. The ruling by the TRA does no more than require the incumbent provider to provide directory publication services to competitors on the same basis that it provides those services to itself. That ruling is consistent with the TRA's duties and well within its authority.

The order also requires that if BST chooses to place its logo on the cover of the directory it is required to publish, it must also offer to place the logo of the other providers on the cover. It is this requirement which appears to be most objectionable to BST and BAPCO and to the majority herein. It is, in my opinion, only a reasonable extension of the nondiscriminatory provision of services requirement of the statutes, and it is within BST's control whether any logo appears. Again, the TRA's "rebranding" requirement is, in substance, the equivalent of the FCC's requirement regarding "rebranding" of operator assistance services, although less technically difficult.

BST and BAPCO, however, have also made an argument that the logo on the cover of the directory is actually BAPCO's logo, stating, "AT&T improperly characterizes the use of the 'BellSouth' name on the cover of the books published by BAPCO. BAPCO has the legal right to use the BellSouth name and logo to identify its products." In a footnote, they state that "BellSouth Corporation has granted its subsidiaries, BAPCO and BST the legal right to use the BellSouth name and logo to identify their products and services and of course, use of the 'BellSouth' name and logo on Tennessee directory covers references both the publisher of the book (*e.g.* BAPCO) and the 'telephone utility' meeting the obligation of Rule 1220-4-2-.15 (*e.g.* BST)."

Thus, BST attempts to argue that the BellSouth logo, which belongs to neither BST nor BAPCO, is intended to represent the publisher. However, as the argument admits, and as the earlier excerpts from BellSouth Corporation publications illustrate, the logo is intended to represent all the components of the parent corporation and to be identified by the consumer as representing the telephone company, whose reputation and customer identification will benefit the other affiliates using the logo.

The TRA noted this situation, and referred to testimony by an official of BAPCO.

> I think this is a good place to mention that I am still confused as to whose name is on the cover of the current BellSouth directory. Mr. Baretto . . . claims that the name on the cover is BAPCO and not BellSouth Telecommunications. If this is true, then BellSouth Telecommunications is in violation of Rule 1220-4-2-.15 . . . . I find Mr. Baretto's testimony disturbing in that it appears that BellSouth and BAPCO are using the BellSouth logo to suit their own purposes and not for the purpose specifically stipulated in the Rule.

The TRA made a specific finding that "the name 'BellSouth' and the Bell logo as they appear on the covers of basic White pages directory listings published by BAPCO on behalf of BellSouth [meaning BST] in Tennessee are understood to refer to the local incumbent telephone company, BellSouth." This finding is supported by material evidence in the record and is within the expertise of the TRA, certainly more so than within this court's expertise.

In view of its authority to regulate the practices of BST, including BST's legal obligation to publish a directory including the customers of competing providers, the TRA clearly has exercised its authority consistently with the statutes' policy goals and in an area within its expertise. It has required BST to offer its directory publishing services to other providers of local service on a nondiscriminatory basis, in accordance with Tenn. Code Ann. § 65-4-124. Under well-settled authority governing our review of administrative agency decisions, and in view of the broad authority given the TRA, I find no basis for setting aside the TRA's declaratory ruling.

Given the concurrence of my colleagues as to the invalidity of the ruling under statutory authority as well as under constitutional principles, I need not address the issue of First Amendment protections against forced commercial speech.

PATRICIA J. COTTRELL,
JUDGE

BEFORE THE TENNESSEE REGULATORY AUTHORITY

March 19, 1998 NASHVILLE, TENNESSEE

Docket No. 96-01692

IN RE:

PETITION OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. FOR A DECLARATORY ORDER AS TO THE APPLICABILITY OF T.C.A. §§ 65-4-104, 65-4-114(l),65-4-117(3) AND 65-4-122(c), AND RULE 1220-4-2-.15 TO TELEPHONE DIRECTORIES PUBLISHED AND DISTRIBUTED ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS, INC. CONTAINING THE NAMES AND TELEPHONE NUMBERS OF CUSTOMERS OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.

DECLARATORY ORDER

This matter came before the Tennessee Regulatory Authority (the "Authority") upon the petition of AT&T Communications of the South Central States, Inc. ("AT&T") seeking a declaratory order as to the applicability of Tenn. Code Ann. §§ 65-4-104, 65-4-114(l), 65-4-117(3) and 65-4-122(c), and Authority Rule 1220-4-2-.15 to White pages directory listings published and distributed on behalf of BellSouth Telecommunications, Inc. ("BellSouth") by its affiliate BellSouth Advertising and Publishing Corporation ("BAPCO") containing the names and telephone numbers of customers of AT&T. On July 17, 1997, a hearing in this matter was held before the Directors of the Authority.

Preceding the conduct of the hearing on July 17th, both BellSouth and BAPCO were made parties herein by Order of the Authority dated February 20, 1997.[1] In addition, several telecommunications service providers sought intervention in this matter at times well in advance of the hearing, these providers are as follows: MCI Telecommunications, Inc., American Communications Services, Inc., and NEXTLINK Tennessee, L.L.C. ("NEXTLINK"). The foregoing providers were granted intervention by various Orders of the Authority, and were provided with the opportunity to fully participate as parties herein. The Directors of the Authority deliberated upon this matter for a decision on the record in this proceeding at a regularly scheduled Authority Conference on September 23, 1997.

Prior to that Conference, on August 1, 1997, Chairman Greer, filed his Charges of Law to the Directors.[2] Subsequently, on August 13, 1997, both BellSouth and BAPCO filed objections to the Charges of Law. At the September 23rd Conference, the Directors first considered the objections filed by BellSouth to the charges of law as filed by the Chairman. The Directors voted unanimously to sustain objection numbers four (4) and five (5), but denied the remaining three (3) objections. The Directors also considered the objections filed by BAPCO to the same

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[1] This order also appointed Director Melvin Malone to serve in the capacity as the Hearing Officer in order to dispose of pre-hearing matters. Additionally, the order also required BellSouth and BAPCO to file responses to AT&T's petition within twenty (20) days from the entry of the Order.

[2] The Charges of Law are used to fulfill the obligation of the presiding agency member acting in the role of Hearing Officer or Administrative Law Judge to advise the remaining agency members as to the law of the case as set forth under Tenn. Code Ann. § 4-5-301(b).

charges. The Directors voted unanimously to incorporate the portions of charges of law prepared by BAPCO concerning the federal and state constitutional issues, as if stated verbatim, in the charges filed by the Chairman. In so doing, each of the Directors independently acknowledged after discussion that they had considered the constitutional issues raised by BAPCO within this proceeding in their preparation for deliberating upon the merits of this matter.[3]

The Directors then considered NEXTLINK's Motion to Strike Portions of Mr. Barretto's Rebuttal Testimony.[4] The Directors voted unanimously to deny the motion.

Following the disposition of the pending motions, each Director openly deliberated in great detail on the merits of the case and stated his or her position as to the proper disposition of the issues. After the deliberations were concluded, the motion as stated by Chairman Greer prevailed. The motion and supporting comments are as follows:

> As a regulator in Tennessee, I am bound by the parameters of federal law, state law and existing rules of this Agency. However, I am also charged with the duty of promoting telecommunications competition in this state according to the state and federal Telecommunications Acts of 1995 and 1996,[5] and with the duties of protecting the interest of both the consumers of Tennessee and the utility providers. Sometimes the fulfillment of all of these duties conflicts, not only with

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[3] *See* Conference Transcript, pp. 54-57.

[4] *See* Conference Transcript, p. 57.

[5] The Tennessee General Assembly enacted the state Telecommunications Act with an effective date of June 6, 1995, while the federal legislation became effective on February 8, 1996.

each other but with the applicable laws involved. I feel that the production of one complete phone book containing the names and numbers of all customers, promotes competition, reduces consumer confusion and best serves the needs of Tennessee. I feel this solution of one complete directory fulfills my policy goals and I would encourage this action to be taken by the parties involved.

All of that said, however, I must now determine what I am allowed to do under the law. The original petition brought four (4) statutes and one (1) Tennessee Public Service Commission/TRA rule in question. And I will explore each of these.

First, [Tenn. Code Ann. §] 65-4-104 deals with the TRA's jurisdiction over public utilities. The TRA obviously has jurisdiction over BellSouth Telecommunications and the fulfillment of their obligations as a utility. **By virtue of contract, then, BAPCO, as BellSouth's agent, becomes responsible for the fulfillment of BellSouth's utility obligations under the law.** This is confirmed by Mr. Barretto's testimony on page 212 of the [hearing] transcript. (Emphasis supplied).

[Tenn. Code Ann. §] 65-4-114(1) empowers the Authority to require every public utility to provide safe, adequate and proper service, but it does not require that utility to provide such service to customers other than its own. This statute, then, in my opinion, is not really applicable to this case.

[Tenn. Code Ann. §] 65-4-117(3) enables the Authority, after hearing, by order in writing, to fix just and reasonable standards to be applied to any utility. This statute seems to be envisioning rules, which truly requires

a rule-making proceeding. Thus, this statute is not applicable, in my opinion, to this case.[6]

[Tenn. Code Ann. §] 65-4-122(c) mandates that a public utility shall not make or give any undue preference to anyone. However, this statute applies more to the ratepayers than to the utilities, as evidenced in *New River Lumber Company versus Tennessee Railway*, 1921, thus, this statute is not relevant to this case either.

Now, Tennessee Public Service Commission Rule [TRA Rule] 1220-4-2-.15 mandates that a telephone directory be published regularly containing the names and numbers of all customers and distributed to all customers served by that directory. The directory must have the name of the utility, the area served, and the month and year of issue on the cover. I think this is a good place to mention that I am still confused as to whose name is on the cover of the current BellSouth directory. Mr. Barretto, in testimony on page 202 and 208-209 of the transcript, claims that the name on the cover is BAPCO and not BellSouth Telecommunications. If this is true, then BellSouth Telecommunications is in violation of Rule 1220-4-2-.15, as further described in Mr. Barretto's testimony on pages 144 and 145 of the transcript. I find Mr. Barretto's testimony disturbing in that it appears that BellSouth and BAPCO are using the BellSouth logo to suit their own purposes and not for the purpose specifically stipulated in the Rule.

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[6] In his deliberative comments, Director Malone noted that under Tenn. Code Ann. § 65-4-117(3), it was questionable as to whether the fixing of standards, regulations, practices or services imposed on a public utility which are generally applicable can be legally imposed when emanating from a contested case. (*See* Conference Transcript, p. 82).

I have been charged with the interpretation of this rule in resolving this issue. I feel that it is important to note that this rule was created in 1968, long before the 1996 Telecommunications Act and the push for competition. Keeping this in mind, and realizing that no more than one utility existed at the time of this statute to address, I believe that the plain language of the rule envisions the name and utility whose customers are inside the directory. Following the same logic, then, I believe that if more than one utility's customers are inside the same directory, then more than one utility's name would be on the cover. I do not believe I have the authority to allow a telephone book with no name on the cover.

The charges of law in this docket bring another important statute into focus, and that is [Tenn. Code Ann. §] 65-4-123. This statute discusses not only the policy of this state to permit competition in all telecom services markets, but also that this regulation shall protect the interest of the consumers. **This Agency has ruled that directory assistance is not a basic service for Tennessee consumers,[7] therefore, in my opinion, the white pages listing is a basic service and an essential tool the customer needs to efficiently and fairly use the network.** This telephone directory, then, needs to be complete and as easy to understand as possible. In my

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[7] This decision was made by a majority of the Directors in the matter of: *United Telephone-Southeast, Inc. Tariff No. 96-201 to Reflect Annual Price Cap Adjustment* (Docket No. 96-01423) and is discussed in the Authority's Order dated September 4, 1997. The majority in making the finding that directory assistance was not a basic service under Tenn. Code Ann. § 65-5-208(a) relied upon the legislative history surrounding the enactment of that statutory section. Director Kyle voted not to support the majority's finding concerning the directory assistance issue.

opinion, the names of local providers on the cover would be helpful to consumers. This would not only serve as information, but would also promote competition by showing consumers they have a choice in service providers. This method also allows small companies to continue to provide service without the financial burden of having to produce their own directory. They may contract with another carrier or publisher to satisfy their TRA Rule requirements and still have their name on the cover of the directory. (Emphasis supplied).

Therefore, after reading all of the testimony and briefs filed in this docket, and after a hearing on the merits, and after contemplation of both my duties as a regulator and my interpretation of the applicable rules and the statutes, I feel that the name or names of the utility or utilities, whose customers are inside the directory, by contract, should be allowed to be included in the cover in the same format. So, if a carrier contracts with another carrier or publisher to have their customers included in a combined directory, then the included carrier should have its name on the directory cover in a like format. **Thus, I move that AT&T be allowed to contract with BAPCO to have its name on the cover of the directory under the same terms and conditions as that of BellSouth's name. And further, BAPCO and/or BellSouth must offer the same terms and conditions to AT&T in a just and reasonable manner.** (Emphasis supplied). (*See* Conference Transcript, pp. 58-63).

Director Kyle seconded Chairman Greer's motion. (*See* Conference Transcript, pp. 73, 84).[8] Director Malone voted

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[8] Both Chairman Greer and Director Kyle agreed that Authority Rule 1220-4-2-.15 applied to this case. That Rule, entitled "Directories - Alphabetical Listing (White Pages)," provides in pertinent part as follows: (1) Telephone directories shall be (cont'd)

no, stating that while he agreed with the results, he thought this matter should have been concluded through a rulemaking procedure. (*See* Conference Transcript, pp. 85-86).[9]

On the basis of the foregoing statements and actions of the Directors, and on consideration of the entire record in this case, a majority of the Directors find and conclude that:

1. BellSouth is a public utility within the meaning of Tenn. Code Ann. § 65-4-101, providing telecommunications services, including local exchange telephone services, in Tennessee as a telecommunications service provider.

2. Pursuant to Tenn. Code Ann. § 65-4-104, the Authority has general supervisory and regulatory powers, and

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(... cont'd)

regularly published, listing the names, address, and telephone number of all customers, except public telephones and numbers unlisted at customer's request.

(2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy shall be furnished to the Commission Authority upon request.

(3) **The name of the telephone utility, the area included in the directory and the month of year of issue shall appear on the front cover.** Information pertaining to emergency calls such as for the police and fire departments shall appear conspicuously in the front part of the directory pages. (Emphasis supplied).

[9] In addition, Director Malone stated as follows:

> As noted earlier, the Rule was promulgated in 1968 . . . Therefore, given the time period of this promulgation and the passage of the 1995 Act, the Rule logically, it appears, only applies to the areas of the State in which a monopoly environment, as existed when the Rule was enacted, has remained intact.

See Conference Transcript, pp. 80-81.

has jurisdiction and control over the public utilities that were parties to this proceeding, and over their property, property rights and facilities for the purpose of carrying out the provisions of Chapter 4 of Title 65.

3. In Chapter 408 of the Public Acts of 1995, now codified as Tenn. Code Ann. § 65-4-123, the Tennessee General Assembly adopted a new declaration of telecommunications services policy, and the Authority is to be governed by that policy in the exercise of its powers and duties with respect to telecommunications services and providers.

4. BellSouth has the duty to provide basic White pages directory listings in compliance with Tennessee law, including Authority Rule 1220-4-2-.15. BellSouth, by contract, has delegated the performance of that duty to its affiliate BAPCO with respect to basic White pages directory listings covering its local telephone service.

5. To the extent BAPCO acts for and on behalf of BellSouth in providing the publication of basic White pages directory listings in Tennessee, those directories must comply with the rules and directives of the Authority.

6. The name "BellSouth" and the Bell logo as they appear on the covers of basic White pages directory listings published by BAPCO on behalf of BellSouth in Tennessee are understood to refer to the local incumbent telephone company, BellSouth.

7. Finally, Section 271(c)(2)(B)(viii) of the Federal Telecommunications Act of 1996 provides that any Bell operating company, such as BellSouth, that seeks to enter the long distance market must list customers of competing local exchange carriers, such as AT&T, in its White pages directory listings.

Based on the findings of fact and conclusions of law and the entire record in this case, a majority of the Directors

declare that BAPCO, in the publication of basic White pages directory listings on behalf of BellSouth, is required to comply with the directives of the Authority and the provisions of Authority Rule 1220-4-2-.15.[10] Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT&T in a just and reasonable manner.

IT IS THEREFORE ORDERED THAT:

1. BAPCO, in the publication of White pages directory listings on behalf of BellSouth is required to comply with the directives of the Authority and the provisions of Authority Rule 1220-4-2-.15. Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT&T in a just and reasonable manner.

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[10] Although BAPCO is not a public utility, by virtue of BAPCO's contract (of record in this case) with BellSouth regarding the publication of basic White pages directory listings, to the extent that BAPCO acts on behalf of BellSouth in providing such directories, BAPCO is bound by this declaratory order.

2. Objection numbers four (4) and five (5) to the Charges of Law as filed by BellSouth be sustained, and that the remaining three (3) objections be hereby denied.

3. BAPCO's objections to the Charges of Law concerning the federal and state constitutional issues be sustained, and the Charges of Law filed by the Chairman be and hereby the same amended to incorporate BAPCO's proposed language with respect to those issues as though stated verbatim therein.

4. NEXTLINK's Motion to Strike the Rebuttal Testimony of Mr. Barretto be denied.

5. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from and after the date of this order; and

6. Any party aggrieved by the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this order.

s/Lynne Greer
CHAIRMAN

s/Sara Kyle
DIRECTOR

ATTEST:
s/K. Waddell
EXECUTIVE SECRETARY

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

Docket No. 96-01692

IN RE:

PETITION OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. FOR A DECLARATORY ORDER AS TO THE APPLICABILITY OF T.C.A. §§ 65-4-104, 65-4-114(l),65-4-117(3) AND 65-4-122(c), AND RULE 1220-4-2-.15 TO TELEPHONE DIRECTORIES PUBLISHED AND DISTRIBUTED ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS, INC. CONTAINING THE NAMES AND TELEPHONE NUMBERS OF CUSTOMERS OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.

SEPARATE OPINION OF DIRECTOR MELVIN MALONE

Like the majority, I too am convinced that the Tennessee General Assembly's policy, as set forth in T.C.A. § 65-4-123, to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets requires, at this stage, that the front cover of the local white pages phone directory published by or on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), which includes the names and numbers of AT&T Communications of the South Central States, Inc.'s ("AT&T") customers, should include the name and logo of AT&T in like manner to

the name and logo of BellSouth. Thus, I agree with the ultimate result of the decision of the majority in this case. Nonetheless, I write separately because I would reach the same substantive result by a different path.

In this declaratory order action, AT&T has requested that the Authority issue a declaratory ruling on whether T.C.A. §§ 65-4-104, 65-4-114(l), 65-4-117(3), 65-4-122(c), or TRA Rule 1220-4-2-.15 require BellSouth to place AT&T's name and logo on the front cover of the local directory that is published by BellSouth Advertising and Publishing Company ("BAPCO") on behalf of BellSouth.

Consistent with the majority, in my opinion, this case turns upon the application of the Rule, as opposed to other state statutes relied upon by AT&T in this cause. The plain language of TRA Rule 1220-4-2-.15 mandates that "the name of the telephone utility" must appear on the front cover of the local phone directory.[1] The controlling question here is whether the Rule requires BellSouth to place AT&T's name and logo on the cover of BellSouth's local phone directory, or the local phone directory published on its behalf, when AT&T's customers are listed in said directory.

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[1] TRA Rule 1220-4-2-.15, which has been in effect since 1968, provides in part that:

(1) Telephone directories shall be regularly published, listing the name; address and telephone number of all customers.

(2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.

(3) *The name of the telephone utility*, the area included in the directory and the month and year of issue shall appear on the front cover. (emphasis added).

Unlike the majority, however, I have concluded that applying the plain language of the Rule, irrespective of its original intent and purpose, in the current environment would result in each local telecommunications services provider distributing or providing, directly or indirectly, its own phone book with its name on the front cover to its customers. No law was submitted nor phalanx of language offered in this case that resulted in a metamorphic effect on the plain meaning or intent of the Rule into anything other than what it is. Nonetheless, I am persuaded that the imposition of such a daunting requirement as would be mandated by the plain language of the Rule and its original intent at this stage in Tennessee's transition to a competitive environment may result in crippling consequences to the development of competition.

For the foregoing and other reasons, I have concluded that the most appropriate path in this case is to declare that neither the Rule nor §§ 65-4-114(l), 65-4-117(3), or 65-4-122(c) require BellSouth to place AT&T's name and logo on the front cover of the local directory published by BAPCO on behalf of BellSouth when AT&T's customers are listed therein.[2] Being ever mindful of the clear and unambiguous

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[2] With respect to the other statutes upon which AT&T requested a declaratory ruling in this case, namely §§ 65-4-114(l), 65-4-117(3) and 65-4-122(c), I am not convinced that they support AT&T's position. In considering the applicability of § 65-4-114(l), there simply is not enough support in the evidentiary record to conclude that a failure to grant the petitioner's request violates this statute. For instance, little was presented to persuade me that BellSouth's services would not be safe, adequate, or proper unless the petition was granted. With regard to § 65-4-117(3), nothing was presented to support a declaratory order action. This statute, in my opinion, is absent any language that would support the relief sought in a declaratory order. Additionally, it is doubtful as to whether the fixing of standards, regulations, practices, or services

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policy of the State of Tennessee to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets and this agency's general supervisory and regulatory power, jurisdiction, and control under § 65-4-104, I am persuaded that the most judicious manner in which to proceed is with a rulemaking to revise TRA Rule 1220-4-2-.15 and/or to develop a rule to apply in a competitive environment.[3]

Hence, while I conclude that the path that I would choose to resolve this matter is more appropriate than that chosen by the majority, the result is the same - all competitors' names on the front cover of BellSouth's local phone directory.

(... cont'd)

imposed on a public utility which are generally applicable can be legally imposed when emanating out of a contested case proceeding. Further, as concerning § 65-4-122(c), assuming that this statute is applicable, I have concluded that there is insufficient evidence in the record to support a determination that this statute requires the result sought by AT&T. In order to make a finding of unreasonable preference or advantage, the Authority must be presented with sufficient evidence to support the same. While many allegations, speculative statements and conclusory claims were put forth at the hearing, in my opinion, neither AT&T or the intervenors, separately or in combination, produced adequate evidence upon which this Authority could reasonably find an unreasonable preference or advantage under § 65-4-122(c).

[3] In my opinion, neither § 65-4-124(c) nor the Rule address pure yellow page directories. Moreover, I have concluded that none of the other state laws cited by AT&T mandate its request with respect to pure yellow page directories. Except that in circumstances where the yellow page directory is combined with the white page directory in a single volume, that single volume directory will be treated as a white page directory.

s/ Melvin J. Malone
DIRECTOR MELVIN MALONE

ATTEST:

s/K. Waddell
EXECUTIVE SECRETARY

BEFORE THE TENNESSEE REGULATORY AUTHORITY

November 2, 1998 NASHVILLE, TENNESSEE

Docket No. 98-00654

IN RE:

PETITION OF NEXTLINK TENNESSEE, L.L.C. TO SANCTION BELLSOUTH ADVERTISING AND PUBLISHING CORPORATION AND ENFORCE THE TRA ORDER REGARDING TELEPHONE DIRECTORIES

ORDER ENFORCING TRA RULE 1220-4-2-.15 AND DENYING ISSUANCE OF SANCTIONS AGAINST BELLSOUTH ADVERTISING AND PUBLISHING CORPORATION

This matter is before the Tennessee Regulatory Authority ("Authority") on the petition of NEXTLINK Tennessee L.L.C. ("NEXTLINK") to sanction BellSouth Advertising and Publishing Corporation ("BAPCO") for failure to comply with TRA Rule 1220-4-2-.15, as interpreted by the Authority in Docket 96-01692, *Petition of AT&T Communications of the South Central States, Inc., for a Declaratory Order et seq.*, entered March 19, 1998 (the "Declaratory Order").[1] [2] The Authority considered the

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[1] A copy of the Authority's March 19, 1998 Declaratory Order is attached hereto as "Exhibit A."

[2] NEXTLINK originally characterized its claim as a petition to enforce the Authority's Declaratory Order in Docket 96-01692. However, counsel for NEXTLINK later orally amended NEXTLINK's petition at oral argument on October 15, 1998, and in so doing, explained that NEXTLINK was not seeking (cont'd)

disposition of this matter following oral argument held on October 15, 1998.

BACKGROUND

On September 23, 1998, NEXTLINK filed its Petition seeking to convene a contested case proceeding to implement sanctions against BAPCO for an alleged refusal to comply with the Authority's Declaratory Order of March 19, 1998, which interpreted TRA Rule 1220-4-2-.15. More specifically, NEXTLINK alleged that BAPCO refused to "inform NEXTLINK of how NEXTLINK may appear on the cover of BAPCO's directories." As a result of this failure, NEXTLINK alleged that it "is unable to put its name on the cover" of BAPCO's White Pages directories as required by TRA Rule 1220-4-2-.15 and the Declaratory Order.

In a response filed on October 2, 1998, BAPCO argued that since the Declaratory Order only granted relief to AT&T and did not specifically direct BAPCO to allow NEXTLINK or other competing local carriers the opportunity to appear on the cover of BAPCO's White Pages directories, BAPCO is under no legal obligation to respond to NEXTLINK's requests.

On September 30, 1998, NEXTLINK filed an Emergency Motion to Set Hearing Date. In its Motion, NEXTLINK stated that it had been informed by BAPCO that the deadline for compilation of the next (1999) Nashville area telephone directory was October 27, 1998. Because of this pending deadline, the Authority considered the motion at its regularly

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enforcement of the order per se but rather was seeking enforcement of TRA Rule 1220-4-2-.15 as interpreted and applied by the Declaratory Order. *See* Transcript of October 15, 1998, at 3.

scheduled Authority Conference on October 6, 1998. Based on the legal issues raised by the parties at that Conference, the Authority requested that legal briefs be filed by 4:30 p.m. on October 9, 1998, and scheduled oral arguments for October 15, 1998.

REQUIREMENTS OF TRA RULE 1220-4-2-.15

TRA Rule 1220-4-2-.15 governs telephone directories (the "White Pages") and requires that directories include on their front cover: the date of issuance, the service area covered by the directory, and the "name of the telephone utility" serving that area. The pertinent provisions of Rule 1220-4-2-.15 are as follows:

(1) Telephone directories shall be regularly published . . .

(2) Upon issuance, a copy of each directory ***shall be distributed to all customers serviced by that directory . . .***

(3) ***The name of the telephone utility***, the area included in the directory and the month and year of issue shall appear on the front cover.

In its Declaratory Order entered on March 19, 1998, the Authority ruled that BAPCO, which publishes the White Pages directories on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), is required to comply with the provisions of TRA Rule 1220-4-2-.15 and interpreted the rule to mean, "if more than one utility's customers are inside the same directory, then more than one utility's name would be on the cover." Declaratory Order, at 5.

The Declaratory Order resulted from a Petition for Declaratory Order filed by AT&T Communications of the South Central States, Inc. ("AT&T") on December 16, 1996. The Order specifically directed BAPCO to comply with the rule by offering AT&T the opportunity to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories "under the same terms and

conditions" that BAPCO offers to BellSouth. The Order further required that those terms and conditions must be offered to AT&T "in a just and reasonable manner." Declaratory Order, at 9.

The Authority's Declaratory Order interpreting TRA Rule 1220-4-2-.15 is now on appeal before the Court of Appeals for the Middle Section of Tennessee.[3] However, at this time, no party has requested or received a stay of the Authority's Order from the Court of Appeals.[4]

ISSUE PRESENTED FOR RESOLUTION

The fundamental issue raised by NEXTLINK's petition and BAPCO's response is whether the Authority may enforce TRA Rule 1220-4-2-.15, as interpreted in the Declaratory Order, pending appeal of the Declaratory Order. On October 15, 1998, following the submission of briefs and oral arguments, the Authority deliberated and concluded that, in the absence of a stay of the Declaratory Order, BAPCO

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[3] *See* Transcript of October 15, 1998, 37. The matter before the Court of Appeals is *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority*, Cause No. 01A01-9805-BC-00248.

[4] The Authority fully acknowledges that the matter arising from Docket No. 96-01692 is before the Court of Appeals. However, in considering this pending matter, the Authority does not seek to expand its jurisdiction nor invade the jurisdiction exercised by the Court in Cause No. 01A01-9805-BC-00248. The Authority in its consideration of this immediate proceeding has determined that the application of TRA Rule 1220-4-2-.15, as it has been interpreted by the Authority in the prior docket, is at issue. Therefore, the Authority, while acknowledging its position of deference to the Court, notes that it has a duty to continue to abide by its rules, unless or until the Court reverses the agency's Declaratory Order. *See* Tenn. Code Ann. § 65-2-102(3).

must comply with TRA Rule 1220-4-2-.15 as interpreted in the Authority's Declaratory Order of March 19, 1998, and as applied to all similarly situated carriers. In support of that decision, the Authority makes the following findings of fact and conclusions of law.

1. NEXTLINK is a certified, competitive local exchange telephone company. *See* Docket No. 95-02502 (September 29, 1995) and Docket No. 96-00728 (April 12, 1996). NEXTLINK offers local telephone service to subscribers in Memphis and Nashville in competition with BellSouth. *See* Docket No. 97-00309, Tr. Vol. VIII B, pages 112-113. NEXTLINK's customer listings are contained within the White Pages directories published by BAPCO on behalf of BellSouth. *See* Docket No. 97-00309, Tr. Vol. XIA, pages 10-11. As required by federal law, the White Page Directories published by BAPCO on behalf of BellSouth must include the names and telephone numbers of NEXTLINK's local customers.[5] The facts from the foregoing dockets were officially noticed by the Authority in a letter dated October 16, 1998, without objection from the parties. A copy of the letter is attached hereto as "Exhibit B."

2. In its Declaratory Order, the Authority declared that the rule on White Pages directories applies to competitive local exchange carriers and that such carriers should be allowed the opportunity to appear on the cover of the White Pages under the same terms and conditions as BellSouth itself. Although the ordering clause of the decision grants

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[5] *See* 47 U.S.C. § 271(c)(2)(B)(viii) which provides that any Bell operating company, such as BellSouth, that seeks to enter the long distance market must list the customers of competing local exchange carriers, such as NEXTLINK, in its White Pages directories.

relief only to AT&T, the Order was based squarely on the Authority's interpretation and application of the agency's rule on White Pages directories and therefore, the agency's holding concerning the interpretation of the rule must not be applied only to AT&T but it must equally be applied to all similarly situated carriers that seek the same relief.[6]

By definition, an agency rule is a "statement of general applicability." *See* Tenn. Code Ann. § 4-5-102(10). Consequently, an interpretation of a rule necessarily applies to all similarly situated companies. NEXTLINK is similarly situated to AT&T in that it too is a certificated competing local exchange provider. Moreover, NEXTLINK is in fact providing service.[7] Therefore, since there are no relevant differences between NEXTLINK and AT&T regarding the application of the rule on White Pages directories, no contested case hearing was required on this issue.

3. In the absence of a stay, the Authority's decision in its Declaratory Order remains in effect pending appeal. Under Tennessee law, the filing of a petition for review "does not itself stay enforcement of the agency decision." *See* Tenn. Code Ann. § 4-5-322(c). BAPCO itself concedes that the Declaratory Order is now in effect, at least as it applies to

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[6] During argument, counsel for BAPCO acknowledged (Transcript of October 15, 1998, at 33) that the Authority's decision in Docket No. 96-01692 was based on the Authority's interpretation of TRA Rule 1220-4-2-.15. In addition, counsel has also acknowledged that "why the Authority would interpret the rule any differently in this context than it had done previously is beyond me." *See* Transcript of October 6, 1998 Authority Conference, at 38.

[7] *See* facts officially noticed in attached Exhibit B.

BAPCO and AT&T.[8] *See also* Transcript of October 15, 1998, at 32. Therefore, the Authority's interpretation of Rule 1220-4-2-.15 is effective and enforceable. *See Underwood v. Liberty Mutual*, 782 S.W.2d 175, 177 (Tenn. 1989) holding that "judgment may continue to be enforced pending an appeal unless a stay is ordered."

4. BAPCO's argument that NEXTLINK's claim is barred by res judicata is not persuasive. Similarly, BAPCO's argument that the Authority cannot now modify the terms of the Declaratory Order has no merit, because NEXTLINK has not asked the Authority to amend its Declaratory Order nor is any such modification necessary to grant NEXTLINK's petition. The Declaratory Order interprets and applies the Authority's rule as to White Pages directories and that interpretation necessarily applies to any other, similarly situated carrier covered by that rule.

5. In its Declaratory Order, the Authority directed BAPCO to negotiate with AT&T for "the same terms and conditions" which BAPCO offers to BellSouth. BAPCO acknowledges that no such terms and conditions exist at this

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[8] At the October 6, 1998 Authority Conference, counsel for BAPCO gave the following answer to an inquiry by Chairman Malone concerning what BAPCO's obligations are under the Declaratory Order if AT&T had customers in the White Pages directories and were now seeking the same relief as NEXTLINK:

> If AT&T had customers in BAPCO's books, so therefore, under your order was required to be offered an opportunity for the cover, we would have sought a stay from the ruling initially. And if that had been denied, then we would operate under the order. Yes, the answer to your question is yes. If we had sought a stay and it had been denied and we were on appeal and even pending the appeal AT&T sought relief, we would have been required to comply with the order. Transcript of October 6, 1998, Authority Conference at 49.

time. *See* Transcript of October 15, 1998, at p. 6. BAPCO is therefore obliged to negotiate with NEXTLINK for the opportunity to appear on the cover of the White Pages directories in a size and style comparable to the name and logo of BellSouth.

6. The Authority will not, at this time, impose sanctions against BAPCO as requested by NEXTLINK. It is clear, however, that the Authority has both the right and obligation to enforce TRA Rule 1220-4-2-.15, as interpreted in the Declaratory Order, unless that Order is stayed or reversed.

IT IS THEREFORE ORDERED THAT:

1. Absent a stay, the Authority's interpretation of TRA Rule 1220-4-2-.15 concerning White Pages directories, as stated in the Authority's March 19, 1998, Declaratory Order, remains in effect pending appeal and will be enforced for the benefit of NEXTLINK or any other similarly situated, competitive local exchange carrier seeking to appear on the cover of the White Pages directories published by BellSouth Advertising & Publishing Corporation.

2. BellSouth Advertising & Publishing Corporation is directed to comply with TRA Rule 1220-4-2-.15, as interpreted in the Authority's Declaratory Order entered on March 19, 1998.

3. NEXTLINK's request for sanctions against BellSouth Advertising & Publishing Corporation is denied at this time.

4. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from and after the date of this order; and

5. Any party aggrieved by the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this order.

s/Melvin J. Malone
CHAIRMAN

s/Lynne Greer
DIRECTOR

_____
DIRECTOR***

ATTEST:

s/K. Waddell
EXECUTIVE SECRETARY

*** Director Kyle voted not to support the decision of the majority because the Declaratory Order interpreting TRA Rule 1220-4-2-.15 is currently pending review before the Court of Appeals in Cause No. OA01-9805-BC-00248.

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY

Tennessee Regulatory Authority at Nashville
No. 96-01692

No. M1998-00987-SC-R11-CV

ORDER

(Filed Aug. 21, 2002)

BellSouth Advertising & Publishing Corporation has filed a petition for rehearing and has asked the court to reconsider its judgment filed July 10, 2002. After careful consideration, the Court concludes that this petition should be, and is, hereby, respectfully, denied.

PER CURIAM

TENNESSEE RULES AND REGULATIONS
1220. TENNESSEE REGULATORY AUTHORITY
1220-4. DIVISION OF PUBLIC UTILITIES
CHAPTER 1220-4-2. REGULATIONS FOR TELEPHONE COMPANIES
Current through October 28, 2002

1220-4-2-.15. DIRECTORIES-ALPHABETICAL LISTING (WHITE PAGES).

(1) Telephone directories shall be regularly published, listing the name; address and telephone number of all customers, except public telephones and number unlisted at customer's request.

(2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.

(3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover information pertaining to emergency calls such as for the police and fire departments shall appear conspicuously in the front part of the directory pages.

(4) The directory shall contain such instructions concerning placing local and long distance calls, calls to repair and information services, and location of telephone company business offices as may be appropriate to the area served by the directory.

(5) Information operators shall have access to records which include all listed telephone numbers (except telephone numbers not listed or published at customer request) in the area for which they are responsible for furnishing information services.

(6) In the event of an error in the listed number of any customer, the telephone utility shall intercept all calls to the listed number for a reasonable period of time provided

existing central office equipment will permit and the number is not in service. In the event of an error or omission in the name listing of a customer, such customer's correct name and telephone number shall be in the files of the information or intercept operators and the correct number furnished the calling party either upon request or interception.

(7) Whenever any customer's telephone number is changed after a directory is published, the utility shall intercept all calls to the former number for a reasonable period of time, and give the calling party the new number provided existing central office equipment will permit, and the customer so desires. Provided, however, the telephone utility may refuse to take such action for good and sufficient reason.

(8) When additions or changes in plant, records or operations which will necessitate a large group of number changes are scheduled, reasonable notice shall be given to all customers so affected even though the additions or changes may be coincident with a directory issue.

(9) The inside cover of the directories all contain the Commission's telephone number: 1-800-342-8359 (toll free).

Authority: T.C.A. §§ 65-2-102, 65-4-104, and 65-4-106. Administrative History: **Original rule certified May 9, 1974. Amendment filed August 18, 1982**; effective September 17, 1982. Amendment filed November 9, 1984; effective December 9, 1984.

02-783 (4)

No. 02-763

Supreme Court, U.S.
FILED
JAN 22 2003

In The
Supreme Court of the United States

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Petitioner,

v.

TENNESSEE REGULATORY AUTHORITY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

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23pp

QUESTION PRESENTED

BellSouth Advertising and Publishing Company (BAPCO) publishes a telephone directory that includes the names and numbers of all customers of BellSouth Telecommunications, Inc. (BellSouth) and competing telephone companies. The Tennessee Regulatory Authority (TRA) ordered BAPCO to include on the front cover of the directory the logos and names of all telephone companies with customers in the directory. Did the Tennessee Supreme Court err in holding that the TRA's order did not violate the Free Speech Clause of the First Amendment?

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OPINIONS BELOW

The decision of the Tennessee Supreme Court is reported at 79 S.W.3d 506. Appendix to BAPCO's Petition for Writ of Certiorari, 1a-30a (Pet. App.) The decision of the Tennessee Court of Appeals (Pet. App. 31a-144a) is reported at 2001 WL 134603. The decisions of the TRA are reported at 1998 Tenn. PUC LEXIS 15 and 1998 Tenn. PUC LEXIS 17.

JURISDICTION

The Tennessee Supreme Court entered its judgment in this case on July 2, 2001. BAPCO filed a timely petition for rehearing, which the Tennessee Supreme Court denied on August 21, 2002. BAPCO invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law abridging the freedom of speech."

STATEMENT OF THE CASE

I. Introduction

This case concerns whether the TRA, a state regulatory agency, may require BAPCO, a subsidiary of BellSouth, to include the names and logos of competing local telecommunication providers on the front cover of the

white pages directory published by BAPCO. The Tennessee Supreme Court found that the TRA's order did not violate the Free Speech rights of BAPCO under the First Amendment. *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W.3d 506, 521 (Tenn. 2002) ("we hold that the TRA's orders survive *Zauderer* scrutiny and consequently are valid under the First Amendment") (Pet. App. 1a-30a).

II. Dissolution of American Telephone and Telegraph Company

This commercial speech case has its origins in the breakup of the Bell Telephone monopoly in 1984, accomplished under federal antitrust laws to ensure that developing competitive long-distance carriers could enjoy efficient and nondiscriminatory interconnection with local telephone monopolies. *See generally United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982) (entering consent decree to break up Bell System as of January 1, 1984), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1984). Twelve years after the dissolution of Bell Telephone into AT&T and the seven Regional Bell Operating Companies ("Baby Bells"), Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Federal Telecommunications Act), to promote competition for local telecommunication services and deregulate local telecommunications services nationwide. The Federal Telecommunications Act eliminated the monopoly position in local telephone service held by all seven Baby Bells since the breakup of the parent corporation in 1984. In particular, the Federal Communications Commission (FCC) was required to adopt all regulations necessary to implement telecommunications competition nationwide

within six months of its enactment. 47 U.S.C. § 251(d)(1) (1996).

Anticipating the adoption of the Federal Telecommunications Act, the Tennessee General Assembly enacted its own Telecommunications Act in 1995, which replaced the state laws granting monopolies to existing local telephone service providers with new statutes designed to permit and foster competition in all telecommunication markets. 1995 Tenn. Pub. Acts, ch. 408 (Tennessee Telecommunications Act) (found at Tenn. Code Ann. § 65-4-123 (Supp. 2002)). Likewise, Tenn. Code Ann. § 65-4-123 (Supp. 2002) requires existing local telephone service providers, known as incumbent local telephone exchange companies, to furnish other providers nondiscriminatory interconnection to their public networks.

III. White Pages Directories

Long before the adoption of the Federal and Tennessee Telecommunications Acts, white pages telephone directories were "traditionally an integral part of local telephone service." *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority*, 2001 WL 134603 *19 (Tenn. Ct. App. 2001) (Koch, J., concurring), *rev'd, BAPCO*, 79 S.W.3d at 521. These directories, which included the names, addresses and telephone numbers of customers in a particular area, provided a convenient and inexpensive way for people to obtain numbers in order to make local telephone calls. *Id.*

In 1968, the Tennessee Public Service Commission, the predecessor state agency to the TRA, adopted a regulation requiring AT&T, which was with few exceptions the only long distance and local telephone company available

to customers in Tennessee, to publish a white pages directory specifying that certain information must be included in the directory. Tenn. Admin. Reg. 1220-4-2-.15. In part relevant this litigation, the regulation states:

> The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover. Information pertaining to emergency calls such as for the police and fire departments shall appear conspicuously in the front part of the directory pages.

Id. This regulation is the center of the dispute in this case.[1]

IV. Administrative Proceedings before the TRA

On December 16, 1996, AT&T filed a Petition Seeking a Declaratory Order as to the applicability of various provisions of the Tennessee Telecommunications Act and Tenn. Admin. Reg. 1220-4-2-.15 to the white pages telephone directory published on behalf of BellSouth by BAPCO.[2] In its Petition, AT&T requested:

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[1] It should also be noted that 47 U.S.C. § 271(c)(2)(B)(viii) of the Federal Telecommunications Act provides that any Baby Bell such as BellSouth that seeks to enter the long distance market must list customers of competing local exchange carriers, such as AT&T, in its white pages directory. BellSouth gained approval to enter the long distance market last year.

[2] Obviously, AT&T filed this petition in response to the adoption of the Tennessee Telecommunications Act in 1995 and the Federal Telecommunications Act in 1996 as AT&T by this time was only a long distance service provider in competition with other long distance

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> [T]he TRA issue a declaratory order declaring that telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as [BellSouth]; and that the covers of directories, published and distributed by BAPCO on behalf of [BellSouth] which include the names and numbers of customers of AT&T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT&T in like manner to the name and logo of [BellSouth], or include no company's name and logo, including 'BellSouth'. . . .

AT&T Admin. Rec., Vol. I, p. 10. Several other competing telephone companies intervened in the AT&T case including MCI and NextLink. After discovery and a hearing on the merits, the TRA issued a declaratory order on March 19, 1998. The Chair of the TRA made the following statements in an oral ruling that was later transcribed into the declaratory order:

> As a regulator in Tennessee, I am bound by the parameters of federal law, state law and existing rules of this Agency. However, I am also charged with the duty of promoting telecommunications competition in this state according to the [state and federal] Telecommunication Act[s] of 1995 and 1996, and with the duties of protecting the interest of both consumers and the utility providers. Sometimes the fulfillment of all of these duties conflicts, not only with each other but with the applicable laws involved. I feel that the

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service providers and did not provide any local telephone service in Tennessee.

> production of one complete phone book containing the names and numbers of all customers, promotes competition, reduces consumer confusion and best serves the needs of Tennessee. I feel this solution of one complete directory fulfills my policy goals and I would encourage this action to be taken by the parties involved.

(Pet. App. 147a-148a)

As to the placement of names and logos of AT&T and other competing local telephone carriers whose customers' names are listed in the directory, the Chair of the TRA stated:

> I feel that it is important to note that this rule was created in 1968, long before the 1996 Telecommunications Act and the push for competition. Keeping this in mind, and realizing that no more than one utility existed at the time of this statute to address, I believe that the plain language of the rule envisions the name of the utility whose customers are inside the directory. Following the same logic, then, I believe that if more than one utility's customers are inside the same directory, then more than one utility's name would be on the cover. I do not believe that I have the authority to allow a telephone book with no name on the cover.

(Pet. App. 150a). In effect, the TRA reinterpreted its own rule to now effectuate the goals of the 1995 Tennessee Telecommunications Act of fostering competition among competing local telephone companies by requiring BellSouth, which has the overwhelming share of the local telephone market in Tennessee, to include the names and logos of its competitors on the cover of a single directory published by its subsidiary BAPCO.

V. State Appellate Review of the TRA Declaratory Order

BAPCO appealed the TRA decision to the Tennessee Court of Appeals by filing a Petition for Judicial Review. After briefing and oral argument, the Tennessee Court of Appeals reversed the TRA declaratory order on February 16, 2001. The intermediate state appellate court found that the TRA was "without authority under present [state] statutes and rules to compel BAPCO to brand its 'White Pages' directory cover with the name and commercial logo of AT&T or any other telecommunications service provider who provides basic, local exchange telephone service." (Pet. App. 54a). Judge William Cain, in his opinion for the Court, would have pretermitted the First Amendment issue; however, since Judge William Koch, in a concurring opinion, did address the First Amendment claim, Judge Cain concurred in that opinion. *Id.* In his concurring opinion, Judge Koch stated:

> [T]he TRA's March 19, 1998 order can be upheld only if the TRA has some compelling justification for its order. I find no such justification in this case. Even if promoting competition in accordance with Tenn. Code Ann. § 65-4-123 could be considered a compelling justification, the TRA's order is more extensive than necessary to advance that interest.

(Pet. App. 80a) (Koch, J., concurring).[3] The dissent by Judge Patricia Cottrell did "not address the issue of First

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[3] Quite clearly, Judge Koch's assertion that the State must set forth a "compelling justification" for the TRA declaratory order applies the incorrect level of scrutiny. Under "strict scrutiny," which is applicable to

(Continued on following page)

Amendment protections against forced commercial speech." (Pet. App. 144a) (Cottrell, J., dissenting).

The Tennessee Supreme Court reversed the intermediate state appellate court on both the jurisdictional and First Amendment issues. (Pet. App. 1a-30a). As to the First Amendment, the Tennessee high court determined that this Court's analysis in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) applied. Specifically, the Tennessee court held that "the TRA's orders are reasonably related to the state's substantial interest in preventing deception of consumers and . . . that the orders under review directly advance the state's interest without imposing an excessive burden." (Pet. App. 28a)[4]. Even though the TRA argued to the Tennessee Supreme Court that its declaratory order passed the four-prong test in *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557 (1980), the Court did not directly address that issue in its opinion.

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political and religious but not commercial speech, the government must justify restrictions on speech with a "compelling state interest." *Burson v. Freeman*, 504 U.S. 191 (1992). On the other hand, the regulation of commercial speech only requires an intermediate level of scrutiny, *i.e.*, a "substantial state interest." *Edenfiled v. Fain*, 507 U.S. 761 (1993).

[4] The Tennessee Supreme Court found that the two-prong test of *Zauderer* was met in this case. First, the Court made a specific finding that "BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunication services are available." (Pet. App. 26a). Second, the Court held that "[g]iven the significant weight of the governmental interest and the relatively narrow impact of the orders in this case, we conclude that the TRA's orders are not unduly burdensome." (Pet. App. 28a).

REASONS FOR DENYING THE WRIT

I. BAPCO Has Failed to Demonstrate the Existence of Any Conflict among the Lower Courts Regarding the Relationship between *Central Hudson* and *Zauderer*.

BAPCO contends (Pet. 12-20) that certiorari should be granted to resolve an alleged conflict between the decision below and decisions of other courts concerning the correct standard under this Court's commercial speech jurisprudence for evaluating the constitutionality of compelled disclosure requirements that are not intended to correct statements "likely to mislead absent the disclosure." (Pet. 16) Specifically, according to BAPCO, the opinion below is contrary to decisions of the Second and Eleventh Circuits, and of the Minnesota Supreme Court, which reserve *Zauderer's* "reasonable relationship" test only for those compelled disclosure requirements necessary to prevent consumer deception but which apply the more exacting *Central Hudson* test to compelled speech requirements that are otherwise motivated. The conflict alleged by BAPCO is illusory.

BAPCO's argument is built entirely upon a mischaracterization of the opinion of the Tennessee Supreme Court. Contrary to BAPCO's repeated assertion that the rationale underlying the TRA's order is unrelated to any need to prevent consumer confusion, the Tennessee Supreme Court made an express finding that the disclosures compelled by the TRA order serve a legitimate purpose precisely because they are intended to "prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available" in the local exchange market, save BellSouth. (Pet. App. 26a). And that finding was central to the Tennessee court's choice of

Zauderer from among this Court's commercial speech cases as supplying the correct standard of review. Thus, the decision below is fully consistent with *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000), in which the Eleventh Circuit declined to apply the more lenient *Zauderer* standard because the state bar rule there under consideration did ***not*** operate to dispel consumer confusion either in purpose or effect.

Petitioner's reliance upon *State v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882 (Minn. 1992) is likewise unavailing. In *Casino Mktg.*, the Minnesota Supreme Court, utilizing *Central Hudson*, struck down a provision of state law requiring that telemarketers employ live operators to make disclosures before playing tape-recorded solicitations to consumers over the telephone, because the court found that the live operator rule bore "little relationship to . . . [the statute's] fraud deterrence features." *Id.* at 888. However, applying *Zauderer*, the Minnesota Court also concluded that the compelled disclosures themselves, as opposed to the requirement that they be delivered by a live operator, did not offend the First Amendment, because their content was designed "to minimize the opportunity for fraud." The *Casino Mktg.* opinion does not intimate that the court either demanded or relied upon proof of actual fraud prevention in order to sustain the required disclosures. There is, accordingly, no conflict between the decision below and *Casino Mktg.* concerning either the circumstances under which this Court's *Zauderer* test is properly invoked or how that test is to be applied.

Finally, petitioner's discussion of two cases from the Second Circuit – *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), and *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001),

cert. denied, 122 S.Ct. 2358 (2002) – does not demonstrate any conflict among the lower courts warranting this Court's intervention. To the extent those decisions are inconsistent with each other, and BAPCO asserts they are, they represent a mere intra-circuit split that affords no basis for certiorari review. *Davis v. United States*, 417 U.S. 333, 340 (1974). Moreover, neither of those cases conflicts with the opinion of the Tennessee Supreme Court here. The compelled disclosure requirement struck down in *International Dairy Foods Ass'n* required dairy manufacturers to specially label milk products derived from cows treated with synthetic growth hormones so as to inform consumers of that fact. Like the Eleventh Circuit in *Mason*, the Second Circuit tested the requirement under *Central Hudson* rather than *Zauderer*, because its asserted purpose was merely to provide consumers with additional information about the product involved, rather than, as in this case, to dispel consumer confusion that might arise absent the compelled disclosure. In any event, as petitioner concedes, the Second Circuit later modified *International Dairy Foods Ass'n* in *National Electrical Manufacturers Ass'n*. Petitioner's characterization of the holding of the latter case – "that *Zauderer* applies to all compelled commercial disclosures, whether or not the disclosure has the purpose of preventing deception" (Pet. 20) – cannot be said to conflict with the Tennessee Supreme Court's application of *Zauderer* in a case where a purpose to dispel consumer confusion has been found to justify the compelled commercial speech requirement under consideration.

II. Even If *Zauderer* Does Not Apply, Plenary Review Is Inappropriate Because the TRA Order Passes Both the Reasonable Relationship Test under *Zauderer* and the Intermediate Scrutiny Test under *Central Hudson*.

Even if there were a conflict among the lower courts regarding the relationship between *Zauderer* and *Central Hudson*, this case would not present an appropriate vehicle for resolving the dispute, because the TRA's order plainly satisfies the tests articulated by this Court in both cases. There can be no doubt that the TRA order passes muster under *Zauderer*. Until the passage of the Tennessee Telecommunications Act in 1995 and the Federal Telecommunications Act in 1996, BellSouth maintained a monopoly on local telephone service in Tennessee, and it effectively continues to do so in most areas of the state today. Given the TRA's mandate under the new legal regime "to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications service markets," Tenn. Code Ann. § 65-4-123 (Supp. 2002), that agency now has a clear responsibility to dispel the lingering misperception among consumers that BellSouth remains their sole source of local exchange service.

As the court below correctly recognized, the TRA's requirement that the names and logos of other service providers appear on the front cover of the white pages directory is reasonably related to the achievement of that important objective. The incumbent local exchange carrier after deregulation – BellSouth – is legally obligated to distribute a single, comprehensive white pages directory for each of its service areas to all telephone customers, including those of its competitors, that lists the names and

numbers of all such customers. TRA Declaratory Order, p. 8 (March 19, 1998) (Pet. App. 153a)[5]. Not surprisingly, BellSouth raises no objection to that state-compelled communication. By requiring that the logos of all service providers appear on the front cover of BellSouth's universally distributed telephone book, the TRA has chosen an effective means of making consumers aware in the new competitive environment that they are no longer forced to purchase service from a single monopoly carrier, a misperception that would only be reinforced if their telephone directories continued to bear only the name and logo of that single carrier.

Nor can it be argued that the TRA's logo requirement is "unduly burdensome." *Zauderer*, 471 U.S. at 65. The TRA's order does not require BellSouth to tout the services of its competitors but merely to communicate the fact of their existence. And, as petitioner recognizes (Pet. 4), it has voluntarily chosen to print on the cover of each directory that the book "[i]ncludes customer listings for all telecommunications companies." Thus, any incremental "harm" to BellSouth's commercial interests caused by the additional disclosures commanded by the TRA order will be *de minimis* at worst. In sum, the Tennessee Supreme Court correctly found that both prongs of *Zauderer*'s "reasonable relationship" test have been met.

Contrary to petitioner's assertion (Pet. 25-26), so too are the third and fourth prongs of the *Central Hudson* test

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[5] 47 U.S.C. § 271(c)(2)(B)(viii) of the Federal Telecommunications Act states that any Baby Bell, such as BellSouth, that seeks to enter the long distance market must list customers of competing local exchange carriers, such as AT&T, in its white pages directory listing.

fully satisfied, although the Tennessee Supreme Court saw no need to analyze the TRA's order under *Central Hudson*.[6] As set forth above, the logo display requirement "directly and materially advances" the TRA's interest in fulfilling its statutory mandate to make consumers aware that they now have a choice of local exchange service carriers. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999). And, because the TRA order's efficacy in accomplishing this important objective is a matter of "simple common sense," respondent is not required by *Central Hudson* and its progeny to demonstrate that completely obvious proposition empirically. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). Furthermore, the commercial speech compelled by the TRA's order is "no more extensive than necessary" to achieve its underlying purpose. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188. The order requires only that the identifying logo and name of competing carriers appear on the cover of the telephone book. BellSouth is not compelled to say anything, either on the cover or elsewhere in the book, regarding the price or quality of the services offered by its competitors. The order thus reflects a "fit" that is "reasonable" between the TRA's legitimate regulatory goals and the means chosen to achieve them. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). That is all *Central Hudson* requires.

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[6] Petitioner does not argue that the TRA's order fails the other elements of *Central Hudson*. (Pet. 25)

III. The Decision Below Does Not Conflict with Either *Pacific Gas & Electric* or *United Foods*.

BAPCO's claim (Pet. 26-30) that the decision below is contrary to *Pacific Gas & Electric Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), is without merit. The TRA's order does not even remotely implicate the First Amendment right of corporate speakers not "to propound political messages with which they disagree" that was recognized in *Pacific Gas & Electric*. The speech compelled by the TRA's order is a simple proposition of fact with which no one can disagree, namely, that there exist companies other than BellSouth which now offer local telephone exchange service in the areas where BellSouth formerly enjoyed a monopoly. Thus, there can be no claim here that the TRA's order either "penalizes the expression of particular points of view" by BellSouth or creates an impermissible "pressure to respond" to a message with which BellSouth disagrees, the vices that unconstitutionally infected the California regulation at issue in *Pacific Gas & Electric*. 475 U.S. at 9, 15-16.

Nor does the TRA's order force BellSouth to endorse a commercial message with which it legitimately takes issue, in violation of the principles animating *United Foods*. The problem with the advertising subsidy program struck down in *United Foods* was that it forced a brand-name mushroom producer to endorse the message "that mushrooms are worth consuming whether or not they are branded," in direct conflict with the producer's belief that its own brand of mushrooms was superior to all others. 533 U.S. at 411. Here, by contrast, the message conveyed by the disclosures ordered by the TRA is not a matter of

opinion but is indisputably true. The TRA's logo requirement forces BellSouth only to disclose the existence and identities of its competitors in the local telephone exchange services market. But BellSouth is not forced to state any views with respect to the quality or value of the services offered by those competitors, or even to endorse the value of competition itself. While BellSouth undoubtedly would prefer consumers to think that it maintains its historic monopoly over local telephone service, *United Foods* itself expressly recognized the validity of compelled disclosure requirements whose purpose is "consistent with the State's interest in 'preventing deception of consumers.'" 533 U.S. at 416 (quoting *Zauderer*, 471 U.S. at 651). As demonstrated above, the court below reasonably concluded that the TRA order was necessary to "prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available" in the local exchange market. (Pet. App. 26a). In sum, the Tennessee Supreme Court correctly recognized in this case that, notwithstanding the protections afforded mushroom growers by *United Foods*, BellSouth should enjoy no First Amendment right to keep consumers in the dark.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 02-783

IN THE

Supreme Court of the United States

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Petitioner,

v.

TENNESSEE REGULATORY AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION

BRIEF *AMICUS CURIAE* OF THE YELLOW PAGES INTEGRATED MEDIA ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF *AMICUS CURIAE* OF THE YELLOW PAGES INTEGRATED MEDIA ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS*

The Yellow Pages Integrated Media Association (the "Association") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari to review a judgment of the Supreme Court of Tennessee of Petitioner BellSouth Advertising & Publishing Corporation ("BAPCO").[1]

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amicus* has obtained and lodges herewith the written consents of the parties to the submission of this brief.

(Continued...)

The Association is a trade association, formed as a non-profit corporation in 1988 as the successor of two prior Yellow Pages trade associations, one that dealt with national Yellow Pages advertising, the other with local Yellow Pages advertising. The older of these predecessor organizations, the National Yellow Pages Service Association ("NYPSA"), was formed in 1975, when the Bell System (of the American Telephone & Telegraph Company) divested itself of management of the Yellow Pages operations of the Regional Bell Operating Companies ("RBOCs"). The membership of the Association is comprised of publishers of both print and electronic Yellow Pages directories; authorized, or "certified," marketing representatives ("CMRs") who sell national Yellow Pages advertising for publisher-members; and associate members, such as printers, software providers, and others who do business with the Yellow Pages industry. The Association is the largest trade association in the Yellow Pages industry.

The number of Association publishers has grown steadily over the years. Starting with 59 publisher-members of NYPSA in 1975 (consisting mainly of the RBOCs and some smaller independent publishers), by the end of 2001 the Association had 166 publisher-members worldwide. These range from

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Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus*, made a monetary contribution to its preparation or submission.

the largest publishers in the industry, such as BellSouth Corporation and SBC Communications, Inc., to an array of smaller publishers including "mom and pop" companies, domestic publishers of foreign language directories, and foreign publishers. A central function and purpose of the Association is to promote competition in the telephone directory industry. By taking advantage of Association facilities, small start-up companies have been able to join the Yellow Pages industry by publishing their own books and to compete for advertising dollars in the markets where the RBOCs and other established publishers distribute their directories.

For the reasons set forth below, it is vitally important that both existing and incipient directory publishers be able to distinguish their products and services by using their distinctive trademarks and logos to identify themselves as the unique source of their own directories. Even before the break-up of the Bell System, public confusion made it difficult for publishers to carve out their own identities and products. With the advent of deregulation and the proliferation of competitive local exchange carriers ("CLECs"), telephone directory publishers have had to expend more money and ingenuity in showing consumers and advertisers that they are not just another arm of the local "telephone company" and that they are publishing something different from the familiar "telephone book."

Although the rulings of the Tennessee Regulatory Authority ("TRA") at issue in this case apply only to white pages directories published by

local exchange carriers, they also necessarily will affect the covers of the many Yellow Pages directories that are published in combination with those white pages directories. The Association urges that a writ of certiorari issue to review the decision, which impinges on the First Amendment and trademark rights of telephone directory publishers.

SUMMARY OF ARGUMENT

The TRA's orders compel directory publishers to display their competitors' trademarks on the covers of directories. This violates the publishers' rights under the First Amendment to speak as they wish about their own products and services, as long as they speak truthfully. Furthermore, the TRA has interfered with a mechanism—trademark law—that was carefully designed by Congress nearly 100 years ago to communicate essential information to consumers. Tennessee consumers in areas subject to the TRA orders must now struggle to determine who is the creator and guarantor of quality for telephone directories, in a marketplace already prone to confusion following the breakup of the Bell monopoly and the restructuring of the telecommunications industry.

Although the TRA sought to justify its action by citing a need to enhance competition, its orders will have the opposite effect. And other jurisdictions dealing with this issue, and seeking to promote competition in their local markets, have developed effective means of doing so without interfering with the trademark rights of telephone directory publishers.

proper trademark usage. The TRA orders, therefore, improperly and unnecessarily infringe on the First Amendment rights of publishers of telephone directories.

ARGUMENT

I. THE TRA'S ORDERS WILL NOT SERVE THE IDENTIFIED STATE INTERESTS, AND THEY SERIOUSLY INTERFERE WITH THE RIGHT OF TELEPHONE DIRECTORY PUBLISHERS TO MAKE USE OF THEIR TRADEMARKS

The petition presents the question of whether the TRA's orders should be reviewed under the First Amendment test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), or under the more lenient test set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). The Association supports BAPCO in its assertion that the Tennessee Supreme Court erred in refusing to apply the *Central Hudson* standard in this case, and in applying the more liberal standard set forth in *Zauderer*. Under either standard, however, the TRA's regulatory action violates the First Amendment right of free speech because compelled use of the trademarks of BAPCO's competitors on the cover of a telephone directory will cause consumer confusion and do irreparable harm to the competitive marketplace. Accordingly, the TRA orders do not "directly advance" (*Central Hudson*) nor are they "reasonably related" (*Zauderer*) to the governmental interests identified by the TRA and Tennessee Supreme Court.

The TRA's orders force BAPCO to do something that may be unprecedented in the field of trademarks. Under the TRA orders, BAPCO must place the trademarks of companies that have nothing to do with the preparation and distribution of the directories on the front cover of the directories, "in like manner to the [BellSouth] name and logo." Pet. App., 5a. This requires display of not just the names of all companies providing local service—but their distinctive, source-indicating logos (i.e., trademarks). Specifically, BAPCO was required to place the famous AT&T "Globe" trademark and less famous Nextlink trademark together with the BellSouth and design trademark on the directory cover, sending a jumbled message to consumers.

Trademarks have long served a critical role in commerce, and in the "indispensable" free flow of commercial information that is essential to a free enterprise system. *See Rubin v. Coors Brewing Company*, 514 U.S. 476, 481 (1995), quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Indeed, trademarks have been used to communicate essential information regarding source of goods and reputation of supplier since the late Middle Ages, as the distance between the makers of goods and their customers increased. Frank I. Schechter, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS 129 (1925).[2] As society evolved, proper use of

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[2] Before that time, marks served a liability function (to

(Continued...)

trademarks became more and more necessary. The barrels of pickles in the general store gave way to bottled pickles, and the Heinz® trademark replaced the storeowner as the guarantor of quality for the consumer. Jerre B. Swann, Sr., David A. Aaker and Matt Reback, TRADEMARKS AND MARKETING 8 (2001).

Recognizing the important role that trademarks play in communicating commercial information to the consumer, Congress enacted the Lanham Act in 1946,[3] declaring that "a sound public policy requires

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identify the artisan responsible for the goods) and a preclusive function (preventing the sale of an artisan's goods in the guild's territory). *Id.* at 47.

[3] As enacted, Section 32 of the Lanham Act proscribed words likely to confuse "purchasers as to . . . source of origin." Lanham Act, ch. 540, § 32, 60 Stat. 427, 437 (1946) (codified as amended at 15 U.S.C. § 1114 (1995). Before this, Section 16 of the Trade-Mark Act of 1905 protected trademark owners and the public from the "colorable imitation" of a registered mark on "merchandise of substantially the same descriptive properties." Trademark Act of 1905, ch. 592, § 16, 33 Stat. 724, 728 (1905). In 1962, Congress further expanded the protection afforded by the Lanham Act by prohibiting the use of words likely to confuse. Act of Oct. 9, 1962, Pub. L. No. 87-772, § 17, 76 Stat. 769, 773-74. Today, therefore, protection of trademark rights under federal law extends to any form of "affiliation, connection, or association" generated by one symbol with that of another. 15 U.S.C. § 1125(a)(1)(A) (1994).

that trademarks should receive nationally the greatest protection that can be given them." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 193 (1985), quoting S. REP. NO. 1333, 79TH CONG., 2d Sess., 5 (1946).

> The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business *and to protect the ability of consumers to distinguish among competing producers.* National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.

469 U.S. at 198 (internal citations omitted) (emphasis added); *see also Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 782 (1992) (intent of Lanham Act is "to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not").

This clear intent of Congress, as identified and confirmed by the Court on numerous occasions, is ill served by the TRA's requirement that producers of telephone directories display multiple trademarks (belonging to different companies) on the directory covers. That is precisely where consumers look to identify the source of the books. They have been

"trained" by a lifetime of seeing trademarks on products and understanding that those marks serve as indicia for the source of those products. One of AT&T's witnesses in the hearing before the TRA explained the importance of the cover in communicating information to consumers, and how trademarks stand out in the minds of consumers:

> The cover of the phone book is a simple, direct, and very important means to communicate to Tennessee consumers.... The cover of the book does tell the consumer what's inside. They read it by its symbols, not by its fine print.

R. Vol. 15 at 64.

A consumer who sees the distinctive trademarks of AT&T and/or other telephone service providers prominently displayed on the cover of a directory, "in like manner to the [BellSouth] name and logo" will likely assume that those companies are in some way responsible for its publication. Consequently, the genuine producer of the directory will enjoy none of the benefits of trademark law. Furthermore, consumers will be deprived of accurate information upon which to base their decisions when selecting among the various competing directories that exist in every market today.

The genuine producer will also be saddled with any unfavorable associations that come with the third party trademarks. In this case, for example, one of the companies that BAPCO was required to include on the

covers, Nextlink, ceased to exist at some point subsequent to the issuance of the TRA orders when it merged with another company and became known as XO Communications.[4] XO subsequently filed for protection under the bankruptcy laws. Other telecommunication providers have been the subject of investigations and criminal proceedings. Obviously BAPCO has no control over any such events, but it (and every other publisher) must deal with whatever negative connotations come with being associated (through compelled co-branding of their directories) with other providers.

The Court does not have to rely on intuition and logic, however, to determine what impressions consumers form when exposed to directories containing competitors' trademarks. BAPCO submitted uncontroverted empirical evidence that this practice will severely hamper consumers in their efforts to distinguish the source of the directories disseminated by BAPCO. R. Vol. 17 at 125-126. The consumer survey conducted by marketing experts at BAPCO's request established that many consumers would mistakenly believe that the directory published by BellSouth's subsidiary was in fact published by one

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[4] The record is silent as to whether this occurred while directories containing the Nextlink trademark were still in circulation. Given the relatively lengthy lifespan of telephone directories, however, such changes in circumstances will inevitably occur from time to time while a directory is still in use.

or more of BellSouth's competitors, or that the other companies were in some way affiliated with BellSouth *Id.* On the other hand, there was no extrinsic evidence before the TRA that this unprecedented co-mingling of trademarks would somehow serve the government's asserted interest in advancing competition.

The telecommunications marketplace has expanded from a single local and long distance service in the 1970s to close to 50 long distance carriers and numerous local service providers today. AMA: MARKETING MANAGEMENT: Spring, 2000. When the Bell System was first broken up, new carriers offered a very limited choice of products. By the mid-1990s, however, carriers had begun to market as many as 75 different products and services, and there are more than fifty cellular service rate plans in most markets today. *Id.*

Trademarks are the consumers' tools for cutting through this overwhelming clutter of product options. They are "the shorthand that consumers use to guide their all important purchasing decisions," Scott M. Davis, BRAND ASSET MANAGEMENT: DRIVING PROFITABLE GROWTH THROUGH YOUR BRANDS 141 (2000), and they serve the function of "reduc[ing] the costs consumers incur in searching for what they desire." *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429-30 (7th Cir. 1985). As Justice Frankfurter observed sixty years ago, "[t]he protection of trade-marks is the law's recognition of the psychological function of symbols. A trade-mark is a merchandising short-cut which ... [t]he owner . . . exploits . . . by making every effort to impregnate the atmosphere of the market with the

drawing power of a congenial symbol." *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

The members of the Association must rely heavily on their "congenial symbols" to differentiate themselves in today's cluttered environment, "as the subject matter of commercial transactions becomes . . . more complex and less tangible." Mark A. Lemley, THE MODERN LANHAM ACT AND THE DEATH OF COMMON SENSE, 108 Yale L.J. 1687, 1693 (1999). As to the smaller members, their very survival is threatened if they cannot effectively and quickly display their trademarks to busy consumers. See David A. Aaker and Erich Joachimsthaler, BRAND LEADERSHIP (2000) ("a brand that loses a measure of uniqueness also loses a measure of its ability to "[b]reak out of the clutter").

Indeed, because of the historical development of the telecommunications and directory publishing industries, non-confusing branding is all the more important. Before the break-up of the Bell System, consumers were accustomed to receiving from their local telephone company one directory that they assumed was the "official" directory; there was little or no competition in most directory markets. This telephone company directory often showed the familiar walking-fingers logo, which, like the phrase "Yellow Pages," was associated with the RBOC directories. To the extent other directories were available in some markets, they were often considered "rip-offs" or useless substitutes and paid little heed.

Today, the monopoly Bell System has been disassembled and markets opened up to new competition. The walking-fingers logo has been ruled generic by the courts and has been freely used by many publishers. A significant portion of consumers remain confused by the post-deregulation market and may not understand that there really is no "official" directory (distributed by the local telephone company) and that a directory is no less useful a product just because it comes from an independent publisher. The TRA orders will exacerbate this problem and will impose a substantial barrier for the smaller, new competitor seeking to enter the directory publishing market. If there is one directory that displays the trademarks of AT&T, Verizon and Sprint (or any other group of industry leaders, as required by application of the TRA orders), consumers may well assume that it is a kind of "super-official" directory. A competing directory published only under the name of a new entrant, when compared to the other, bigger directory displaying multiple trademarks of industry leaders, is likely to be dismissed as a bogus or suspect product, thus making it difficult if not impossible for the new entrant to compete.

For all of these reasons, a company's right to make unfettered use of its trademarks is deserving of the highest level of protection under the First Amendment. *See Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 694 (6th Cir 1981). Because the TRA's orders work at cross purposes with federal trademark law, which Congress intended to "protect the ability of consumers to distinguish among

competing producers," *Park 'N Fly, Inc.*, 469 U.S. at 193, the Court should grant certiorari.

II. THE RESTRICTIONS IMPOSED BY THE TRA ORDERS ARE MORE EXTENSIVE THAN NECESSARY AND ARE OVERLY BURDENSOME.

In addition to their failure to serve the governmental interests identified by the Tennessee Supreme Court and the TRA, the TRA's orders do not meet the *Central Hudson* test of whether "the speech restriction is not more extensive than necessary to serve the interest it supports." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999). It is not necessary to deny directory publishers or consumers the benefits of federal trademark law in order to serve the identified interest of promoting local telephone service competition in the Tennessee marketplace. The experience of regulatory agencies in other states is instructive.

The Public Utilities Commission of Ohio ("PUCO") is one of the regulatory authorities that has considered whether the names of all telephone companies providing service in a particular area should be included on the front cover of directories. The result was a new rule, which provided: "The front cover of the directory shall include the name of the local exchange companies which are served by that directory. . . ." ANDERSON'S OHIO ADMINISTRATIVE CODE, Rule 4901:1-5-06(C)(5) (1998).

During the proceeding that culminated in the new rule in Ohio, the PUCO rejected alternatives

offered by the incumbent carrier, Ameritech, stating "[t]he Commission concludes that neither of these alternatives offered by Ameritech are [sic] as effective as the proposed Rule for providing the public with an easily accessible method of informing the public of the [local exchange carriers] serving the area." *The Public Utilities Commission of Ohio, In the Matter of Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code,* Case No. 96-1175-TP-ORD, Finding and Order, June 26, 1997 at page 21. After a rehearing, this rule became effective January 1, 1998.

At that point, therefore, the Ohio Commission was proceeding with an approach similar to that followed by the TRA. Like the TRA, the PUCO based its action on the desire to educate consumers that there were alternatives to the incumbent local exchange provider. Both wanted consumers to understand that the phone directories contained complete listings for the area served, regardless of which carrier was serving the subscriber.

Shortly after it issued its rule, however, the PUCO scaled back its requirement. Ameritech requested a waiver of the Ohio rule, so that in lieu of the required listing of companies it could place the following statement on the directory cover: "This directory includes the complete listings of all local exchange companies." The PUCO agreed to the waiver, explaining its rationale as follows:

> The Commission's main objective behind the [rule] was to inform the public that

> the directory includes the published and listed telephone numbers for subscribers of all the local exchange telephone companies providing service in the calling area covered with the directory. We believe that this same objective can be accomplished through a statement, on the front cover, which clearly informs the public that the directory includes the published and listed telephone number for subscribers of all the local exchange companies providing service in the calling area covered within the directory.

The Public Utilities Commission of Ohio, In the Matter of Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code, Case No. 96-1175-TP-ORD, Entry, April 30, 1998, at page 3.[5]

The PUCO amended its rules again in 2001 to eliminate altogether the requirement that the names of competitors appear on the front cover of directories. *In the Matter of Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 00-1265-TP-ORD, Finding and Order, May 29, 2001. Instead, the PUCO adopted a rule requiring the directory to contain

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[5] Subsequently, GTE, United Telephone Company of Ohio d/b/a Sprint, and Cincinnati Bell Telephone Company received similar waivers.

certain information on the inside front cover and first pages of the directory, including "(d) [t]he name of the local service provider(s) and the locations and telephone numbers of the business offices as may be appropriate to the area(s) served by the directory immediately following the required emergency information." Thus, after first seeking to impose a requirement very similar to that imposed by the TRA, the Ohio agency responsible for this issue determined that there is a less restrictive way to accomplish the same goal.

Other states have similar requirements to that in Ohio. In New Mexico, for example, "[t]he White Pages Provider shall provide space in the customer guide pages of the White Pages directory to a CLEC for the purpose of notifying the customers how to reach the CLEC to request service, contact repair service, dial directory assistance, reach an account representative, request buried cable local service, and contact the special needs center for customers with disabilities." MICHIE'S NEW MEXICO ADMINISTRATIVE CODE, Section 17.11.18.13(F) (2002).

In Hawaii, the telephone directory must "[s]tate on the front cover the name of the telecommunications carrier issuing the directory, the area covered by the directory, and the month and year of issue." WEIL'S CODE OF HAWAII RULES, Section 6-80-64(a)(3) (2002). In addition, preceding the customer listings, the directory must contain detailed information relating to all other carriers whose customers' numbers are listed in the directory, including instructions on how to contact them and how to review their tariffs. WEIL'S

CODE OF HAWAII RULES, Sections 6-80-64(a)(4)(B) and (C) (2002).

In Texas, "[a] CTU (certified telecommunications utility) or its affiliate that publishes a white pages telephone directory on behalf of the CTU shall provide a single page per CTU in the information section of the white pages telephone directory, for the CTU to convey critical customer contact information regarding emergency services, billing and service information, repair services and other pertinent information. . . . " TEXAS ADMINISTRATIVE CODE, § 26.272(e)(1)(D)(vi).

These states have the same interest in promoting telephone competition and consumer awareness as does Tennessee, and they have come up with effective ways of advancing that interest without sacrificing the benefits of proper trademark usage. This is persuasive evidence that the drastic measure adopted by the TRA is more extensive than necessary to serve the interest it supports. The TRA rule, therefore, improperly infringes on the First Amendment rights of publishers of telephone directories. *Central Hudson* 447 U.S. at 564.

Should the Court agree with the Tennessee Supreme Court that the *Zauderer* standard is the proper standard to apply in this case of compelled speech, the TRA's order still does not pass Constitutional muster. As noted by the Tennessee Supreme Court, there must be a "fit between the legislature's ends and the means chosen to accomplish those ends." *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W.

3rd 506 at 521 (2002), quoting *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469 at 480 (1989). The Court has further refined the Fox test in *City of Cincinnati v. Discovery Network*, stating that "if there are numerous and obvious less burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). As shown above, other states, in attempting to achieve the same ends as the State of Tennessee, have chosen much less burdensome alternatives. The Tennessee Supreme Court erred in determining that the TRA's order was consistent with the Supreme Court's ruling in Fox.

* * *

CONCLUSION

The Tennessee Supreme Court's decision is creating confusion in the marketplace, hindering competition among directory publishers, and causing grave and irreparable harm to the First Amendment and trademark rights of telephone directory publishers in Tennessee. The arena cries out for clarification and

for national uniformity, invoking the bedrock jurisdiction of the Court. The writ of certiorari to review the judgment of the Supreme Court of Tennessee should issue.

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No. 02-783

In the Supreme Court of the United States

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Petitioner,

v.

TENNESSEE REGULATORY AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONERS

The petition explains that the Tennessee Supreme Court improperly evaluated the TRA's co-branding requirement under the "reasonable relationship" test of *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), when it should have applied the more rigorous standard of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Despite the Tennessee Supreme Court's statement that *Zauderer* sets forth "the defining test for First Amendment analysis of compelled speech cases" (Pet. App. 24a), the TRA apparently agrees with us that *Zauderer*'s "reasonable relationship" test does not govern *all* compelled commercial speech. Br. in Opp. at 9. Instead, the TRA contends (*id.*) that *Zauderer* applies only to disclosure requirements relating "to any need to prevent consumer confusion." The TRA argues that its orders had this goal; that the Tennessee Supreme Court's decision turned on that fact; and that the petition accordingly is "built entirely on a mischaracterization" of the court's opinion.

The TRA's argument that the decision below is consistent with *Zauderer* is plainly wrong. *Zauderer* turned on this Court's finding that, without the disclaimers mandated by the government, the advertisements at issue would themselves have misled consumers. Here, neither the TRA nor the Tennessee Supreme Court has ever found that BAPCO's directory covers are misleading. To the contrary, the TRA conceded, in this very proceeding, that directory covers containing only BellSouth's name and logo are neither deceptive nor confusing: it expressly advised the court below that it "[did] not dispute the implicit finding by the majority of the Court of Appeals that the speech *is not misleading* * * *." Application for Permission to Appeal Pursuant to Tenn. R. App. P. 11, at 14 n. 17 (emphasis added).

In light of this concession, and the absence of any basis to conclude that the directory covers are misleading, the TRA

is forced to argue that *Zauderer* applies to any compelled disclosure that "operate[s] to dispel consumer confusion in either purpose or effect" (Br. in Opp. 10), *even when the regulated speech does not itself confuse or mislead.* Under that construction of *Zauderer*, the government would be able to impose disclosure requirements on non-misleading commercial speech simply by asserting that some consumers are ill-informed about the matters at issue. This Court's precedents establish, however, that the First Amendment affords far greater protection to truthful and non-misleading commercial speech. In any event, the TRA has not even established here that any consumer confusion exists or that the co-branding of BAPCO's directory will ameliorate it.

1. The Tennessee Supreme Court's decision rests on a radical misreading of *Zauderer.* Although no party argued that *Zauderer* applied, the court below held that *Zauderer*'s "reasonable relationship" test governs *all* cases involving compelled commercial speech. Citing its prior decision in *Walker* v. *Board of Professional Responsibility*, 38 S.W. 3d 540, 545 (Tenn. 2001), the court explained that it had found "the distinction between restricted speech cases and compelled speech cases" to be "significant" (Pet. App. 24a); deemed regulations that "require[ ] disclosure rather than prohibition" to be "less objectionable under the First Amendment" (*id.*); and adopted "the more forgiving standard * * * in *Zauderer* [ ] as the defining test for First Amendment analysis of compelled speech cases." *Id.*

Nothing in *Zauderer* suggests that that decision was intended to apply so broadly. This Court approved the government-mandated disclosure in *Zauderer* under a "reasonable relationship" test because it was "self-evident" that, without that disclosure, the advertisement at issue would have been "deceptive" to consumers. 471 U.S. at 652-653. Prior to *Zauderer*, the Court had held that while "[m]isleading advertising may be prohibited entirely," *In re R.M.J.*, 455 U.S. 191, 203 (1983), "the States may not place an absolute prohi-

bition on certain type of misleading information * * * if the information also may be presented in a way that is not deceptive." *Id.*; see also *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n. 24 (1976) (the State may require commercial messages to "include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive"). *Zauderer* governs where regulation short of a ban can be used to render commercial speech non-misleading; but its relatively lenient standard of review comes into play only *after* the threshold showing of deceptiveness has been made.

As noted above, the TRA has acknowledged that BAPCO's covers are *not* misleading (see Pet. 23), and no court has ever made a contrary finding. Thus, the Tennessee Supreme Court did *not* conclude, as *Zauderer* requires, that the mandatory co-branding of BAPCO's directory had the purpose of preventing the covers from misleading the public. Instead, the court stated that the purpose of the TRA's orders was to "directly advance competition in the provision of local telephone services by effectively informing consumers as to the existence of alternative local telephone services." Pet. App. 27a. See also *id.* at 26a ("The ultimate object of the regulations * * * is * * * to inform consumers."); *id.* at 28a ("informing consumers about their choices in the local telecommunications service market is a fundamental aspect of promoting free competition"). There is a significant difference between "informing consumers" and preventing deception.

The TRA hangs its hat on the Tennessee Supreme Court's statement that the orders "are intended to 'prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available' in the local exchange market, save BellSouth." Br. in Opp. 9 (quoting Pet. App. 26a). But the observation that some consumers may have a "mistaken belie[f]" about the existence of competition is a far cry from a holding that *the directory covers*

themselves mislead or confuse consumers. Put another way, the fact that the TRA's orders would allow BellSouth's competitors "to increase the public awareness of [their] brand[s] without incurring the expense of a marketing campaign" (Pet. App. 8) does not mean that the orders "prevent[ ] deception of consumers" (471 U.S. at 638) within the meaning of *Zauderer*.

Furthermore, the record contains no evidence *either* that consumer confusion actually exists *or* that the directory covers make it worse. Nor is there any common-sense basis to find the covers misleading: they convey accurately that a BellSouth company publishes the directories but that the books include listings for customers served by other carriers. Thus, the TRA seeks to invoke the dramatically reduced standard of review associated with *Zauderer* on the basis of nothing more than unsupported assertions. But the "rote invocation" of words such as "'potentially misleading'" is insufficient to avoid the careful analysis that *Central Hudson* requires. See *Ibanez* v. *Florida Dep't of Business and Prof'l Regulation*, 512 U.S. 136, 146 (1994).

2. Because the Tennessee Supreme Court applied *Zauderer* without any finding that the TRA's orders were aimed at correcting otherwise deceptive speech, the decision *does* plainly conflict with *Mason* v. *Florida Bar*, 208 F.3d 952 (11th Cir. 2000). There, as respondent acknowledges (Br. in Opp. 10), the Eleventh Circuit declined to apply *Zauderer* because, in its view, the advertisement at issue was not "dangerously misleading." 208 F.3d at 957. Instead, the court applied the more searching *Central Hudson* standard and concluded that the Florida Bar's disclosure requirements violated the First Amendment. See *id.* at 952.

The Tennessee Supreme Court's approach also conflicts with *International Dairy Foods Association ("IDFA")* v. *Amestoy*, 92 F.3d 67 (2d Cir. 1996), in which the court struck down a requirement that dairy manufacturers disclose their

treatment of cows with synthetic growth hormone. As the TRA recognizes, "[l]ike the Eleventh Circuit in *Mason*, the Second Circuit tested the requirement under *Central Hudson* rather than *Zauderer*, because its asserted purpose was merely to provide consumers with additional information about the product involved, rather than * * * to dispel consumer confusion absent the compelled disclosure." Br. in Opp. at 11. Here, in contrast, the court below applied *Zauderer* despite the fact that the TRA merely wished to "inform consumers" about BellSouth's competitors.

Moreover, there *is* a trend to apply *Zauderer* indiscriminately to *all* cases involving compelled commercial speech. That trend is exemplified both by the decision below and by *National Electrical Manufacturers Ass'n ("NEMA")* v. *Sorrell*, 272 F.3d 104 (2d Cir. 2001), in which the Second Circuit (relying on *Zauderer*) upheld a labeling requirement after concluding that the First Amendment "is satisfied * * * by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose." *Id.* at 115. The TRA dismisses *NEMA* as evidencing only an intra-circuit split (Br. in Opp. 11), but does not dispute that the Second Circuit in *NEMA* – in conflict with the Eleventh Circuit – applied the *Zauderer* test to a compelled disclosure that had nothing at all to do with preventing consumer confusion or deception. Other courts have concluded as well that *Zauderer* applies to *all* disclosure requirements. See Pet. 18-19.

3. The TRA also contends (Br. in Opp. 12-14) that the petition should be denied because its orders survive scrutiny under both *Zauderer* and *Central Hudson*. As discussed above, the orders do not satisfy *Zauderer* because they do not address a demonstrated risk that consumers will be deceived or confused by BAPCO's directory covers. Moreover, the TRA has failed to refute our showing (Pet. 25-26) that its orders fail the *Central Hudson* test.

Assuming the substantiality of the government's asserted interest in "mak[ing] consumers aware that they now have a choice of local exchange service carriers" (Br. in Opp. 14), the TRA still must show, under the third prong of *Central Hudson*, that the orders "directly and materially advance" that interest. *Ibanez*, 512 U.S. at 143. The agency cannot do that, because it never even examined whether placing multiple company logos on the cover of the incumbent's telephone directories would meaningfully increase consumers' awareness that they may choose among different providers of local telephone service. Instead, the TRA simply acceded to AT&T's petition after concluding that its old regulation supported it (Pet. App. 150a) and that publication of the trademarks of local providers would "be helpful to consumers" (*id.* at 151a) – ignoring the undisputed evidence (see Pet. 5) that the co-branding would actually *increase* consumer confusion.

The TRA now claims, of necessity, that the efficacy of its orders is a matter of "simple common sense" that need not be demonstrated empirically. Br. in Opp. 14. But the government's burden to satisfy the third prong of *Central Hudson* "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 188 (1999) (quoting *Edenfeld* v. *Fane*, 507 U.S. 761, 770 (1993)). "[W]ithout any findings of fact, or indeed any evidentiary support whatsoever" (*44 Liquormart Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996)), it is impossible to conclude that the TRA's orders "will *significantly* advance the State's interest." *Id.* (emphasis added).[1]

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[1] Citing *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995), the TRA contends that "common sense" alone can satisfy

The TRA also has failed to meet its burden under the fourth prong of *Central Hudson*: it has not demonstrated that the orders are "not more extensive than necessary" to serve its stated interests. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188. "[I]f the Government [can] achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1506, 1507 (2002) (striking down FDA advertising restrictions because "there is no hint that the Government even considered" alternatives to those restrictions). The TRA never even explored whether less substantial intrusions on BAPCO's First Amendment rights would serve its interest in informing consumers about the existence of competition. "If the First Amendment means anything, it means that regulating speech must be the last – not first – resort." *Thompson*, 122 S. Ct at 1507. "Yet here" – as was the case with the advertising restrictions invalidated in *Thompson* – "it seems to have been the first strategy the Government thought to try." *Id.* at 1507.

To satisfy *Central Hudson*, moreover, the government must "'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by [its] regulations." *Lorrilard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2425 (2001) (quoting *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)). As the amicus brief filed by the Yellow Pages Integrated Media Association ("Yellow Pages

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the government's burden under the third prong of *Central Hudson*. In fact, the Court noted in that decision that it had previously approved a restriction on speech "based solely on history, consensus, *and* 'simple common sense'" (515 U.S. at 628 (quoting *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992)) (emphasis added)) – not on common sense alone. And in *Florida Bar*, the Court expressly noted that the Bar had supported its speech restriction with anecdotal evidence that was "noteworthy for its breadth and detail." 515 U.S. at 627.

IMA") explains (at 5-14), restricting a company's use of its trademark to identify its product imposes very substantial costs. Yet the TRA gave no consideration whatsoever to those burdens when it ordered BAPCO to imprint its directory covers with the trademarks of unrelated companies.

Finally, the TRA's orders plainly are not the least restrictive means of fostering competition. Neither the Telecommunications Act of 1996 (the "Act"), which had the goal of opening local telephone service to competition, nor the Federal Communications Commission's rules implementing the Act, require incumbents to give competing local exchange carriers access to directory covers. See 47 U.S.C. § 271(c)(2)(B)(viii); 47 C.F.R. § 51.217(c)(3)(i).[2] Moreover, other state public utility commissions have deemed it sufficient for the incumbent to provide information about competitors *inside* the directories (as BAPCO did prior to the orders in this case). See Yellow Pages IMA Br. 16-18. Indeed, before the TRA issued its orders, BAPCO did *more* than many jurisdictions require by stating on the front cover of its directories that they include numbers served by all local exchange carriers. And, of course, BellSouth's competitors can (and do) advertise their provision of local telephone service through countless outlets other than BAPCO's directory covers.

4. As we demonstrated in the petition (at 26-30), the TRA's orders also offend principles recognized by this Court in *Pacific Gas & Electric Co.* v. *Public Utils. Comm'n*, 475 U.S. 1 (1986), and *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). The TRA does not refute our showing that

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[2] The FCC recently approved BellSouth's application to begin providing long distance service in Tennessee after concluding that BellSouth had take the steps necessary to open the local exchange market to competition and observing that BellSouth's competitors had gained a double-digit market share in the state. FCC Order No. 02-331, WC Docket No. 02-307 (Dec. 19, 2002), at 2-4.

this case provides the Court with an important opportunity to consider the doctrines discussed in these cases in the context of compelled commercial speech.

a. In *Pacific Gas*, the Court held that a corporation (a public utility operating in a highly regulated area) had a First Amendment right not to disseminate statements with which it disagreed. The TRA argues – and we acknowledged in the petition (at 28) – that *Pacific Gas* concerned public speech whereas this case involves commercial speech. But that is a reason to grant, not to deny, the petition: this case provides the Court with an opportunity to develop its First Amendment jurisprudence by examining whether, and in what circumstances, a corporation may be forced to publish *commercial* messages with which it disagrees.

Moreover, the TRA greatly overstates its case when it argues that BAPCO is being required to utter "a simple proposition of fact with which no one can disagree." Br. in Opp. 15. The display of a trademark is not merely a factual statement: trademarks are valuable because they both identify products and convey multifaceted messages to consumers – including any negative impressions associated with a particular brand. See *Mishawaka Rubber & Woolen Mfg. Co.* v. *S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) ("A trade-mark is a merchandising short-cut which * * * [t]he owner * * * exploits * * * by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol"); Yellow Pages IMA Br. 9-10 (explaining that the "genuine producer will be saddled with any unfavorable associations that come with the third party trademarks"). That is why AT&T was not satisfied with a factual statement that carriers other than BellSouth serve local customers in Tennessee, but sought to have its *logo* printed on the cover. BAPCO's desire to avoid forced association with the commercial symbols of its competitors is an important interest that merits significant First Amendment protection.

b. The TRA's effort to obscure the relevance of *United Foods* also fails. The TRA acknowledges (Br. in Opp. 15) that the advertising subsidy program at issue in *United Foods* violated the First Amendment because it forced a mushroom producer to endorse the message that its competitors' unbranded goods were worthy of consumption. The TRA does not dispute that a company that is compelled to disseminate an objectionable message *directly* faces an even greater affront to its First Amendment rights.

The TRA contends that its orders pass muster under *United Foods* because they force BellSouth only to disclose "the existence and identities of its competitors in the local telephone exchange services market." *Id.* at 16. As discussed above, however, that is an entirely unrealistic description of the messages that BAPCO has been ordered to communicate. In fact, by carrying the logos of its competitors, BAPCO may be conveying implicitly, for example: that BellSouth and the other companies are "one big family" that cooperatively provide telephone service; that BAPCO and the other companies worked together to produce and distribute the phone book; that BAPCO approves of the other companies' business conduct, advertising, and quality of service; and/or that there is no difference between BellSouth and other companies.

In addition, unlike in *United Foods*, BellSouth is not merely subsidizing objectionable speech, but is carrying these messages directly. In failing to recognize the importance of BAPCO's First Amendment right *not* to publish the commercial messages of its competitors and to employ its own trademark to identify and differentiate its products, the Tennessee Supreme Court has rendered a decision that plainly merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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